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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 814

THE STATE TAX COMMISSION OF UTAH,
Petitioner,

vs.

MALCOLM P. ALDRICH and MARY S. HARKNESS, Administrators with the will annexed of the Estate of Edward S. Harkness, Deceased,
Respondents.

BRIEF OF PETITIONER

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Respondents.

BRIEF OF PETITIONER

I.

OPINIONS OF COURTS BELOW

This case was decided by the Supreme Court of the State of Utah on September 17, 1941 and is reported at .....Utah....., 116 Pac. (2nd) 923. The memorandum decision of the trial court is unreported, but is found at pages 15-16 of the Record.

II.

JURISDICTION

The Supreme Court of the State of Utah is the highest court of law and equity of that State.

The judgment of the Supreme Court of the State of Utah herein sought to be reviewed was entered on September 17, 1941 (R. 26). Petition for rehearing was denied by the Supreme Court of the State of Utah on October 24, 1941 (R. 26). The judgment of the Supreme Court of the State of Utah was rendered in a cause in which the validity, under the Fourteenth Amendment to the Constitution of the United States, of Sections 80-12-2 and 80-12-3, Revised Statutes of Utah, 1933, was directly involved.

Petition for writ of certiorari was granted by this Honorable Court on January 12, 1942.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 937 (28 U.S.C.A., Sec. 344) and the Act of February 13, 1925, c. 229, Sec. 8, 43 Stat. 940 (28 U.S.C.A., Sec. 350).

III.

STATEMENT OF THE CASE

The petitioner, the State Tax Commission of the State of Utah, is a body politic created under and by virtue of the constitution and laws of the State of Utah and is charged with the duty, among other things, of enforcing the provisions of Chapter 12, Title 80, Revised Statutes of Utah, 1933 and of collecting the estate taxes due thereunder (R. 1-2).

Respondents are the duly appointed, qualified and acting administrators with the will annexed of the estate of Edward S. Harkness, deceased (R. 1).

Edward S. Harkness died January 29, 1940, being at the time of his death a resident of and domiciled in the State of New York (R. 1). At the date of his death, Edward S. Harkness was the owner of 10,000 shares of the common stock and 400 shares of the preferred stock of the Union Pacific Railroad Company (R. 2-3). The certificates representing these shares of stock were in the

possession of the decedent in the State of New York at the time of his death and the same certificates are now physically located in the State of New York in the possession of respondents as executors of the estate of the decedent (R. 3). These shares of stock were recorded on the books of the Union Pacific Railroad Company in the name of Edward S. Harkness at the date of his death (R. 3). Other than the ownership of the stock in question, the transfer of which the State Tax Commission contends is subject to tax under and by virtue of the provisions of Chapter 12, Title 80, Revised Statutes of Utah, 1933, the decedent owned no property within the jurisdiction of the State of Utah.

The Union Pacific Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Utah (R. 2).

At the time of Mr. Harkness' death, the laws of the State of New York allowed as a credit against the estate tax imposed by the State of New York the amount of any constitutionally valid estate or inheritance tax paid to any other state within three years after the decedent's death (R. 4).

Certain other facts which were alleged by respondents in their original complaint were admitted to exist, but were challenged as being immaterial and irrelevant. This position was maintained throughout the original proceeding and throughout the presentation of the appeal to the Supreme Court of the State of Utah. Petitioner maintains that same position before this Honorable Court and will demonstrate later in this brief why such facts are immaterial.

The State Tax Commission of Utah claims and asserts that the transfer at death of said shares of stock of the Union Pacific Railroad Company from said decedent is subject to tax under the provisions of Chapter 12, Title 80, Revised Statutes of Utah, 1933, and has demanded payment of said tax as a condition precedent to the giving of its consent to the transfer of said shares of stock from

the decedent to such beneficiaries as may be entitled thereto under the terms of the decedent's will.

On October 4, 1940, respondents filed an action in the Third Judicial District Court of the State of Utah, in and for the County of Salt Lake, praying for a declaratory judgment to the effect that the transfer of such stock was not subject to the Utah estate tax and requesting an injunction against the State Tax Commission to restrain and prohibit the Commission from asserting any tax liability upon such transfer (R. 1-8). The allegations of respondents' complaint include averments to the effect that the imposition of such a transfer tax by the State of Utah would violate the Fourteenth Amendment to the Constitution of the United States of America (R. 5, 6, 7). This was the earliest opportunity at which a federal question could be raised.

The cause was submitted to the trial court and on January 22, 1941 the trial court rendered its memorandum decision in favor of respondents and against petitioner (R. 15-16). On March 24, 1941, declaratory judgment and decree as prayed was entered by the trial court (R. 17-19). One of the grounds of said decree of the trial court was that the imposition of the tax contended for by petitioner would violate the Fourteenth Amendment to the Constitution of the United States of America. Reference to the memorandum decision of the trial court (R. 15-16) will demonstrate that in substance the sole basis of the trial court's decision was that the proposed tax would violate the Fourteenth Amendment.

Appeal was duly taken to the Supreme Court of the State of Utah (R. 19) and on September 17, 1941 the Supreme Court of the State of Utah rendered its decision, affirming that of the trial court (R. 20-26). (Utah 116 Pac. (2nd) 922.)

The decision of the Supreme Court of the State of Utah was based solely upon the principle that the proposed imposition of the tax under the facts of the case at bar

would violate the provisions of the Fourteenth Amendment to the Constitution of the United States of America.

Petition for rehearing was duly and timely made to the Supreme Court of the State of Utah on the 14th day of October, 1941 and was denied by that Court on the 24th day of October (R. 26).

Petition for writ of certiorari was granted by this Honorable Court on January 12, 1942.

IV.

SPECIFICATION OF ERRORS

The question presented in this action is whether the State of Utah may, without violation of the Constitution of the United States of America, levy and collect its state tax upon the transfer at death of shares of stock in domestic corporations which stock was at the time of death owned by a decedent nonresident of and not domiciled in the State of Utah.

We assign the following as specification of errors in the decision on that question by the Supreme Court of the State of Utah:

1. The Supreme Court of the State of Utah erred in applying the principles established by this Court in applicable decisions to the facts in this cause.

2. The Supreme Court of the State of Utah erred in its application of the Fourteenth Amendment to the Constitution of the United States to the facts in this cause.

3. The Supreme Court of the State of Utah erred in holding that the imposition of the Utah estate tax upon the transfer of shares of stock of domestic corporations of the State of Utah owned by nonresident decedents was in violation of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of the State of Utah erred in not holding that Chapter 12, Title 80, Revised Statutes of Utah, 1933, as herein sought to be applied was valid.

V.

ARGUMENT

In this brief petitioner will present the following points in argument:

1. The tax imposed by Chapter 12, Title 80, Revised Statutes of Utah, 1933, although denominated an "inheritance" tax, is in reality an estate or transfer tax.

2. The taxation of the transfer of the shares of stock in question by the State of Utah is intended to be imposed by the Statutes of the State of Utah, if not violative of the Federal Constitution.

3. The imposition of this tax by the State of Utah is not violative of the "due process clause" of the Fourteenth Amendment, within the true meaning of that term.

4. There is a basically sound distinction, which should be observed, between stocks of domestic corporations and bonds of domestic corporations for the purpose of levying an estate tax. When this distinction is recognized and applied, the tax here proposed must be sustained.

5. Decided cases prior to the decision of this Honorable Court in *First National Bank of Boston* v. *Maine, infra*, including opinions of this Honorable Court, were unanimous to the effect that the state of incorporation could legally levy a death duty tax upon the transfer at death of stock in domestic corporations owned by nonresident decedents.

6. A critique of *First National Bank of Boston* v. *Maine, infra.*

7. *First National Bank of Boston* v. *Maine, infra,* has been reversed in principle by later decisions of this Honorable Court and should, therefore, be reexamined and specifically overruled.

1. The Utah Tax Is An Estate Tax

The tax which your petitioner proposes to impose upon the transfer of the Union Pacific Railroad Company stock is levied by the provisions of Chapter 12, Title 80,

Revised Statutes of Utah, 1933.[1] While Title 80 is denominated and commonly referred to as the "Utah Inheritance Tax Law", the character of the tax is definitely that of an estate tax upon the transfer of the net estate of a decedent. See *State Tax Commission* v. *Backman*, (1936) 88 Utah 424, 55 Pac. (2nd) 171. The State of Utah, therefore, does not levy a tax upon the right of a beneficiary to receive the property from an estate, but rather upon the privilege of transferring the property in any one or all of the ways specified in the statute.

The gross estate of a decedent is determined, so far as material to the case at bar, by including "all property * * * within the jurisdiction of this state, and any interest therein, whether tangible or intangible, which shall pass to any person * * * by testamentary disposition or by law of inheritance or succession of this *or any other state or country* * * *". (Section 80-12-3, Revised Statutes of Utah, 1933.) The tax is placed upon "the transfer of the net estate of every decedent, *whether a resident or nonresident of this state*". (Section 80-12-2, Revised Statutes of Utah, 1933.) (Italics ours.)

It is thus seen, as will be more fully developed later in this brief, that the Utah tax here involved is levied upon the transfer from a decedent of any and all property of every nature and kind of which the State of Utah has jurisdiction for tax purposes. We are not concerned with jurisdiction over the beneficiary who receives the property, with jurisdiction for the purpose of probate, nor with jurisdiction for any purpose other than tax upon the transfer of property of the estate. We are concerned only with jurisdiction over the property transferred for the limited purpose of taxation.

2. This Transfer Is Taxable Under Utah Law If Not Violative Of The Fourteenth Amendment

The decision rendered by the Supreme Court of the State of Utah in the case at bar clearly demonstrates that

[1] See Appendix A.

the Utah Supreme Court interprets the statutes of that state to impose the tax if constitutional under the Fourteenth Amendment to the Constitution of the United States. At page 924 of 116 Pac. (2nd), the Utah Supreme Court states:

> "For many years taxes were collected in such cases (as the case at bar) by this and several other states." (Parenthetical insertion ours.)

Again at pages 924-925 that Court stated:

> "Our statute, commonly called the Inheritance Tax Law, was enacted in 1901. Provisions imposing death duty taxes upon the transfer of stock in Utah corporations even though owned by nonresident decedents have remained on the statute books without any substantial change since that time. From the time the statute became effective until the Supreme Court of the United States handed down its decision in First National Bank of Boston v. Maine * * * citation * * * the state construed and applied the statute as including within its tax provisions stock of Utah corporations owned by nonresidents. Such application of the statute was never questioned in the courts, all estates coming within the statute as so construed paying the tax without litigation. * * * After the decision in the case of First National Bank of Boston v. Maine, supra, holding a tax such as that here involved to be in violation of the Fourteenth Amendment to the Federal Constitution, the attorney general who under the statute had been the collector of inheritance or estate taxes ceased, and advised the State Tax Commission as his successor as collector of death duty taxes to cease collecting the taxes on stock in Utah corporations owned by non-residents, because of that decision. It is clear therefore that the only reason the State Tax Commission ceased to insist upon, and to enforce its right to collect such taxes is the decision of the United States Supreme Court in the First National Bank of Boston v. Maine, supra."

Then again at page 925, after discussing some of the more recent decisions of this Honorable Court, the Supreme Court of the State of Utah concluded:

> "It matters not what our personal opinions may be in the matter. The question being one under the Federal constitution, the opinion of the Supreme Court of the United States is controlling. It having in the case of the First National Bank of Boston v. Maine, supra, declared corporate stock under circumstances such as here involved to be subject to inheritance taxes only in the state of the decedent's domicile, we must follow that ruling until the court which announced it shall overrule it."

From this opinion alone we submit that the position of the Supreme Court of the State of Utah is clearly defined, subject only to whatever limitation may be placed upon the power of the State of Utah to tax by this Court's interpretation of the Fourteenth Amendment. Prior to the decision of this Court in *First National Bank of Boston* v. *Maine*, (1932) 284 U. S. 312, 76 L. ed. 313, 52 S. Ct. 174, the State of Utah had, without exception, levied this tax upon the transfer of shares of stock of domestic corporations owned by nonresident decedents. See also *Larson* v. *MacMiller*, (1920) 56 Utah 84, 189 Pac. 579.

3. There Is No Violation Of "Due Process"

We submit that within the true meaning of the term "due process of law" as contained in the Fourteenth Amendment to the Constitution of the United States of America there is nothing unconstitutional in the imposition of the tax in the case at bar by the State of Utah.

"Due process of law" is a term which has received the interpretative attention of this Court in innumerable cases. The term, however, has never been defined by this Court. As is stated in Taylor, *Due Process of Law* (1917) at page 274:

> "The gravest desideratum in English and American law is and has ever been a clear, comprehensive and authoritative definition of the elements which, under all circumstances and conditions, constitute due process of law * * *."

This lack of definition creates an argumentative problem which is almost insurmountable. Not having a definition or delimitation of the term, it is, of course, difficult to clearly point out why a particular situation does not violate that constitutional limitation.

We believe, however, that this Honorable Court has in recent decisions indicated an acceptance of what we submit is the true meaning of that term.

In *Wisconsin v. J. C. Penney Company*, (1940) 311 U. S. 435, 85 L. ed. 267, 61 S. Ct. 246, this Court, in discussing the meaning of the term "due process of law", said at 311 U. S. 444-445:

> "The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. * * * A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.
>
> "Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. * * * That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. * * *
>
> "* * * Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances, or even occasional deviations over a long course of years, not unnatural in view of the confusing complexities of tax problems, do not alter the limited nature of the function of this Court when

state taxes come before it. At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize."

In *Newark Fire Insurance Company* v. *State Board of Tax Appeals*, (1939) 307 U. S. 313, 83 L. ed. 1312, 59 S. Ct. 918, two opinions were rendered by this Court. In the opinion written by Mr. Justice Frankfurter the following was stated at page 324:

"Especially important is it to abstain from intervention within the autonomous area of the legislative taxing power where there is no claim of encroachment by the states upon powers granted to the National Government. It is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended."

From these opinions, especially when read in connection with the surrounding facts of the cases, we derive this conclusion. If the tax imposed by the state bears any relation to protection, benefit or opportunities granted to or power over the subject matter of the tax, then the tax does not violate the due process of law restriction. We also draw the conclusion that if the power to tax exercised by the state does not infringe upon a power reserved exclusively to the Federal Government, then it would appear that the state tax has cleared successfully at least one hurdle in connection with the due process limitation.

For many years it appears as though this Honorable Court considered the due process of law clause as impos-

ing upon it the judicial duty of examining every tax imposed by a state to determine whether the tax was wise, whether it reached fair results in the judgment of this Court, and whether the tax was economically sound. We submit that such a view of the meaning of due process is untenable. We urge that this Court consider its duty under that clause as limited to determining whether the state proposing to tax has any foundation for the levy of the tax by reason of either control over the incident of taxation, benefits conferred in connection with the incident of taxation, protection granted to such incident, or opportunities granted or created by that state and connected with the incident of taxation. If any one or more of these elements are found to exist within the taxing state then the policy of the law, the wisdom of enacting it and the choice of subjects of taxation, within reasonable limitations as to classification, are exclusively for the legislative policy of the particular state, into which field this Court should not inject itself.

Under such a test the State of Utah clearly and unmistakably has constitutional jurisdiction to levy a tax upon the transfer of shares which it has created in corporations whose very life is owed to the laws of the State of Utah.

The State of Utah has *power* over those shares as demonstrated, in only one example, by the provisions of Section 80-12-34, Revised Statutes of Utah, 1933, wherein it is provided that if any corporate stock be transferred by the corporation without the payment of the tax, such corporation shall be liable for the tax. See also *State* v. *First National Bank of Boston*, (1931) 130 Me. 123, 154 Atl. 103 (reversed by *First National Bank of Boston* v. *Maine*, *supra*); *Cream of Wheat Company* v. *Grand Forks*, (1920) 253 U. S. 325, 64 L. ed. 931, 40 S. Ct. 558; *Corry* v. *Baltimore*, (1905) 196 U. S. 466, 49 L. ed. 556, 25 S. Ct. 297; *Schuylkill Trust Company* v. *Pennsylvania*, (1938) 302 U. S. 506, 82 L. ed. 392, 58 S. Ct. 295.

The State of Utah has granted *protection* in connection with the shares of stock the transfer of which it seeks to tax. Only under its laws can the stockholders enforce certain rights, regardless of the forum in which an action might be brought against the corporation. To Utah's law the shares owe their very existence and attributes of property. Under the laws of the State of Utah the shares continue in existence and continue to have value. The protections granted by the State of Utah to these shares are manifest and multitudinous.

The corporation in which the stockholder is a part owner and the shares which the stockholder owns receive the *benefit* of having such shares and such corporation exist and live in an orderly, civilized society.

When an investor chooses to purchase shares of stock in a particular corporation he avails himself of the protection, benefits and opportunities granted under the laws of the state which created that corporation. If he, the investor, chooses to live in a state other than the state which created the corporation and the shares which he buys, he has voluntarily chosen to avail himself of the protection, benefits and opportunities of the laws of two sovereignties. He has chosen to subject himself personally to the power of the sovereign of his domicile and has chosen to subject his investment to the power and control of the sovereign of the domicile of the corporation. For, as stated in Fletcher, *Cyclopedia Corporations*, Permanent Edition, Vol. 11, Section 5101, "it is the settled general rule that the situs of corporate stock is deemed to be in the state where the corporation has its domicile, * * *"; and the domicile of the corporation is and remains in the state of incorporation. *Cream of Wheat Company* v. *Grand Forks, supra.*

In discussing this question of power, protection, benefit, opportunity as related to shares of stock and, in fact, in considering the whole problem presented by this case, it must, of course, be remembered that shares of stock are not the same thing as the certificate representing the

shares. See Fletcher, *Cyclopedia Corporations*, Permanent Edition, Vol. 11, Section 5092; see also Section 5097, where it is stated:

> "As pointed out above, shares of stock are property, but they are intangible and incorporeal property, an 'incorporeal, intangible thing,' existing only in abstract legal contemplation. There are cases, however, in which they have been referred to as tangible property, in some respects at least; but it would seem that, in such cases, the court had reference rather to the physical representative of the shares, that is, to the certificate of stock, than to the stock itself."

Being intangible, incorporeal property, existing only in abstract legal contemplation, it is, of course, difficult to discuss "situs", "location", or "presence" of a share of stock. But from authorities discussed in this brief the conclusion seems to be inescapable that shares of stock are located and have a situs at the domicile of the corporation.

We do not urge upon this Court a rule of taxation under death duty taxes which would allow the taxation of the transfer of shares of stock by the state of incorporation to the exclusion of the state of the domicile of the owner. However, let us analyze for a moment the claims of the state of the domicile of the owner to either a right to tax or the exclusive right to tax. The state of the owner's domicile admittedly gives protection, benefit and opportunities to the person of the owner. It admittedly has power and control over the person of the owner. But what does the state of the owner's domicile give in connection with or in relation to the shares of stock exclusively and divorced from the person of the owner? We submit that such state has no basis for claiming that it gives anything in relation to the shares of stock considered as property apart from the person of the owner which would entitle it to ask a tax in return. Unless the corporation in which the shares are held happens to do business in the state of the owner's domicile, that state does not

even grant the owner of the shares the benefit of its courts as a forum in which to litigate in connection with his property. If the corporation does happen to do business in that state, the courts of the state may be open as a forum but the laws of the state of incorporation will govern the rights and privileges of the shareholder and will determine the extent of his incorporeal property rights. Furthermore, the courts of the state of the corporate domicile are always open to the shareholder. It might, therefore, be argued that if any choice must be made, the choice would lie in favor of the state of incorporation rather than in favor of the state of the domicile of the owner.

But we submit that no choice is necessary or need be made between those two states so far as the right to tax is concerned.

First, even admitting for the sake of the point that "double taxation" is here involved, there is no Federal constitutional provision against it.

In *Cream of Wheat Company* v. *Grand Forks, supra,* this Court in concluding its unanimous opinion said, referring to the argument that a certain theory would result in holding intangible property to have a "situs" in two places at once and hence subject to "double taxation":

> "To this it is sufficient to say that the Fourteenth Amendment does not prohibit double taxation. *Coe* v. *Errol,* 116 U. S. 517, 524; *Kidd* v. *Alabama,* 188 U. S. 730, 732; *Fidelity & Columbia Trust Co.* v. *Louisville, supra.*"

In *Illinois Central Railroad Co.* v. *Minnesota,* (1940) 309 U. S. 157, 84 L. ed. 670, 60 S. Ct. 419, in an unanimous opinion this Court said at page 164 of 309 U. S.:

> "Appellant makes some point of double taxation. But the flaw in that argument is exposed by the familiar doctrine, aptly phrased by Mr. Justice Holmes, that the 'Fourteenth Amendment no more forbids double taxation than it does doubling the amount of a tax; short of confiscation or proceedings unconstitutional on other grounds'."

See also *Fort Smith Lumber Co.* v. *Arkansas*, (1920) 251 U. S. 532, 64 L. ed. 396; 40 S. Ct. 304; *Swiss Oil Corporation* v. *Shanks*, (1927) 273 U. S. 407, 413, 71 L. ed. 709, 47 S. Ct. 393 (and cases there cited); *Baker* v. *Druesedow*, (1923) 263 U. S. 137, 68 L. ed. 212, 44 S. Ct. 40; *Citizen's National Bank of Cincinnati* v. *Durr*, (1921) 257 U. S. 99, 109, 66 L. ed. 149, 42 S. Ct. 15; *Curry* v. *McCanless*, *infra*.

These opinions, as well as those in cases to be discussed later in this brief, are unequivocal in holding that there is no prohibition against double taxation in the Fourteenth Amendment nor anywhere else in the Constitution of the United States. That being true, respondents have no basis for objection to this tax. Respondents' sole theory to date is that *First National Bank of Boston* v. *Maine*, *supra*, is controlling. As we shall establish under point 6 of this brief, the single basic principle upon which the *Maine* case is founded is that the Fourteenth Amendment prohibits double taxation. That foundation being destroyed, the decision crumbles of its own weight. Since this argument will be fully developed under points 6 and 7, we pass further enlargement thereon at this time. The Court is respectfully reminded of the unbroken, unquestioned line of authorities cited above when considering points 6 and 7.

Second, we present that "double taxation" is a misnomer when used in connection with a case such as the one at bar. Double taxation is not involved in this case. "Multiple taxation" may be involved but certainly there is no constitutional limitation against multiple taxation. See *Illinois Central Railroad Company* v. *Minnesota*, *supra*; Cooley on *Taxation*, 4th Edition, Vol. 1, Section 223, pages 475-6[11].

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[11] In Section 223, Cooley states the rule to be as follows:

> "To constitute double taxation, objectionable or prohibited, the two or more taxes must be (1) imposed on the same property, (2) by the same state or government, (3) during the same taxing period, and (4)

Referring back, however, to the test which we submit is the proper test in determining whether a tax violates the due process clause, namely, the "power, protection, benefit or opportunity test" laid down by recent decisions of this Court, we submit that, regardless of the use of the term "double taxation" being proper or improper, the Fourteenth Amendment cannot be stretched to the point of prohibiting even true double taxation where two states, two separate sovereigns, both give, in any measure, protection, benefits or opportunities, or in any measure exercise or have the jurisdiction to exercise power in relation to the incident of taxation.

We believe that this Court need not restrict itself further in interpreting the phrase "due process of law" than it

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for the same purpose. *There is no double taxation,* strictly speaking, *where* (a) *the taxes are imposed by different states,* (b) one of the impositions is not a tax, (c) one tax is against property and the other is not a property tax, or (d) the double taxation is indirect rather than direct." (Italics ours.)

And again, in Section 230, Cooley lays down the following principles in connection with a discussion of the effect of even a specific constitutional prohibition against "double taxation":

> "Duplicate taxation, as a result of being taxed in two different states, is not within a prohibition against double taxation, for the reason that a tax in another state is not considered a tax for the purposes of the state whose tax is objected to. For instance, the personalty of a nonresident may be taxed in the state where it is located although it is also taxed in the state where the owner resides. So shares of stock in a foreign corporation may be taxed to the owner in the state where he resides, even though he or the corporation has paid taxes on the stock in the state where the corporation was created, or the corporation has paid taxes on the corporate property in the home state. *Likewise, the exaction of inheritance or succession taxes in two or more states is not invalid as double taxation.*" (Italics ours.)

has in the recent decisions above discussed. However, there is authority of a very persuasive nature to the effect that due process of law means only that a person's property be not taken except in accordance with "the law of the land"; that such phrase means the same as "the law of the land" as used in the Magna Charta. 5 *Cal. Jur.* Sec. 217; see also *Den ex dem. Murray* v. *Hoboken, etc.*, (1855) 59 U. S. 272, 18 How. 272, 15 L. ed. 372; *Davidson* v. *City of New Orleans,* (1877) 96 U. S. 97, 24 L. ed. 616.

Such a definition of the term would not limit its application only to procedural due process but, on the other hand, neither would it extend its application to permit the interposition of the economic theories or any innate sense of fairness which the judiciary might feel violated by a particular exercise of the taxing power. The problem of raising revenues to support state government is sufficiently complex without injecting into the delicate structure of taxation fear or apprehension that the judiciary may consider the tax from the standpoint of equity, economics or moral justification aside and apart from the constitutional limitations explicitly laid upon the exercise of the power to tax.

We also urge that in any interpretation of the meaning of the phrase "due process of law" this Court should remember and use as a guide the historical background of that amendment. See the *Slaughter-House Cases,* (1872) 83 U. S. 36, 16 Wall. 36, 21 L. ed. 394. While the Slaughter-House Cases involved the question of the validity of the exercise of police power by the State of Louisiana under the Fourteenth Amendment, nevertheless, the case is instructive for its treatment of the history of the Thirteenth, Fourteenth and Fifteenth Amendments. See especially pages 68 to 82 of 83 U. S.

There, in the first pronouncement by this Honorable Court on the application of the Fourteenth Amendment, it was authoritatively stated that in any interpretation

of that amendment, the reasons for its enactment must be considered. It was then pointed out that the Fourteenth Amendment was enacted to require each state to give equal rights and equal protection to all persons and their property regardless of race or sex. It was placed in the Constitution to guarantee the underlying principle for which the Civil War was fought — equality of rights, opportunities and protection. Although differing in the application of that interpretation to the facts of the particular case, the dissenting opinion also recognized those same historical interpretative guides and objected only to the private character of the legislative enactment under scrutiny on the grounds that it granted a private monopoly. Surely, considered from the historical background of that amendment, this tax by the State of Utah should not be struck down.

We do not intend that this Court should apply the Fourteenth Amendment only to situations strictly analogous to those immediate problems arising after the Civil War. We do not contend for any such limited application. But we do urge that in arriving at the meaning of due process this Court should consider the historical background as one of the determinative factors. For, as was stated by the Court in its opinion in the *Slaughter-House Cases* at page 72 of 83 U. S.:

> "But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it."

That opinion also lays down the principle that those words in the Fourteenth Amendment mean the same and no more as the identical words in the Fifth Amendment when applied to the National Government. See also *Mag-*

nano Company v. *Hamilton*, (1934) 292 U. S. 40, 78 L. ed. 1109, 54 S. Ct. 599.

In Burnet v. *Brooks*, (1933) 288 U. S. 378, 77 L. ed 844, 53 S. Ct. 457, this Court, against the objection that the Federal Government was barred by the due process clause of the Fifth Amendment, held squarely that the National Government had jurisdiction to tax under its estate tax law the transfer of shares of stock in domestic corporations (corporations organized or created in the United States) owned by nonresident decedents. At page 392 of 288 U. S. this Court, in citing with approval the rulings of the Commissioner of Internal Revenue, stated:

> "Stock in a domestic corporation * * * constitute property situated in the United States, although owned by * * * a nonresident. A domestic corporation * * * is one created or organized in the United States."

Again at page 394, this Court stated:

> "We think that the Government's construction of the provision is the more reasonable one; that *the place where the stock was held was not an element in the application of § 303 (d), and that this provision was designed to insure the inclusion of the stock of a domestic corporation in all cases, whether the certificates were physically present in the United States or not.*" (Italics ours.)

It is here to be noted in passing that this Court there held, as we in this brief urge, that the physical location of the pieces of paper evidencing the shares of stock is unimportant.

Finally, at pages 399 to 401 of 288 U. S. this Court stated:

> "As jurisdiction may exist in more than one government, that is, jurisdiction based on distinct grounds — the citizenship of the owner, his domicile, the source of income, the situs of the property — efforts have been made to preclude multiple taxation through the negotiation of appropriate international conventions. These endeavors, however, have proceeded upon ex-

press or implied recognition, and not in denial, of the sovereign taxing power as exerted by governments in the exercise of jurisdiction upon any of these grounds. • • •.

"Respondents urge that constitutional restriction precluding the federal estate tax in question is found in the due process clause of the Fifth Amendment. The point, being solely one of jurisdiction to tax, involves none of the other considerations raised by confiscatory or arbitrary legislation inconsistent with the fundamental conceptions of justice which are embodied in the due process clause for the protection of life, liberty and property of all persons — citizens and friendly aliens alike. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489; *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Heiner* v. *Donnan*, 285 U. S. 312, 326. If in the instant case the Federal Government had jurisdiction to impose the tax, there is manifestly no ground for assailing it. *Knowlton* v. *Moore*, 178 U. S. 41, 109; *McCray* v. *United States*, 195 U. S. 27, 61; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 153, 154; *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 24; *United States* v. *Doremus*, 249 U. S. 86, 93. Respondents' reliance is upon the decisions of this Court with respect to the limitation of the taxing power of the States under the due process clause of the Fourteenth Amendment. *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312. They insist that the like clause of the Fifth Amendment imposes a corresponding restriction upon the taxing power of the Federal Government.

"The argument is specious, but it ignores an established distinction. Due process requires that the limits of jurisdiction shall not be transgressed. That requirement leaves the limits of jurisdiction to be ascertained in each case with appropriate regard to the distinct spheres of activity of State and Nation. The limits of State power are defined in view of the relation of the States to each other in the Federal

Union. The bond of the Constitution qualifies their jurisdiction. This is the principle which underlies the decisions cited by respondents. These decisions established that proper regard for the relation of the States in our system required that the property under consideration should be taxed in only one State and that jurisdiction to tax was restricted accordingly. In *Farmers Loan & Trust Co.* v. *Minnesota, supra,* the Court applied the principle to intangibles, and referring to the contrary view which had prevailed, said (p. 209): 'The inevitable tendency of that view is to disturb good relations among the States and produce the kind of discontent expected to subside after establishment of the Union. The Federalist, No. VII. The practical effect of it has been bad: perhaps two-thirds of the States have endeavored to avoid the evil by resorting to reciprocal exemption laws.' It was this 'rule of immunity from taxation by more than one State,' deducible from the decisions in respect of various and distinct kinds of property, that the Court applied in *First National Bank* v. *Maine, supra,* p. 326."

It would seem only fair to conclude that if jurisdiction within the meaning of due process of law existed in the National Government under the facts of *Burnet* v. *Brooks*, then, similarly, jurisdiction exists in the State of Utah in the instant case, unimpaired by the same words, subject to the same interpretation, in the Fourteenth Amendment. As has been shown above and as will be developed more fully later in this brief, due process of law cannot legitimately be taken to prohibit double taxation or, better said, taxation of the same event or transfer by two states, both having jurisdiction. Since the only other basis for respondents' contention that the tax in the instant case violates due process is grounded upon some nebulous argument that the State of Utah has no jurisdiction, and since it has been established under this point that such jurisdiction does exist (see also point 7 of this brief) it becomes clear that this tax should be sustained by this Honorable Court. See also *Curry* v. *McCanless, infra,*

especially the italicized portion of the quotation therefrom at page 52 of this brief.

Still another guide which we believe is helpful, if not controlling, in arriving at the meaning of due process of law is laid down in Taylor, *Due Process of Law* (1917) at pages 286, *et seq.* It is there stated that there are four fundamental elements comprising due process of law: (1) notice, (2) hearing, (3) application of equal laws, and (4) jurisdiction. If these four requirements are met, then due process exists. We present that such an analysis of due process is sound. Many specific constitutional guarantees exist in State and Federal Constitutions which will amply protect other inalienable rights such as trial by jury, freedom of speech, compensation for private property taken for public purposes, etc. But if a person may not be deprived of his property without first, notice of proceedings; second, an opportunity to be heard; third, the application to him of laws equally applicable to others similarly situated; and fourth, the existence of jurisdiction in the sovereign government which is acting, surely his rights, his immunities, his privileges, his property will be fully protected — surely due process of law exists.

In this case, respondents have never made any point of lack of due process under any of the first three requirements listed by Taylor, *supra.* Respondents have had notice. There have been hearings in court in regular, established procedural manner. The tax applied to respondents is applied equally to all persons similarly situated, to all decedents owning shares of stock in domestic corporations of Utah. Respondents' only apparent ground for contesting the application for this tax under Taylor's test would be under the fourth requirement. As we have demonstrated above and as will be more conclusively established later in this brief, the jurisdiction of the State of Utah to levy the tax is clear.

We, therefore, submit that under any proper interpretation of "due process of law" the tax here proposed is constitutional. We further submit that the due process of

law clause of the Fourteenth Amendment does not require this Court to make any choice between the power of the State of New York and the power of the State of Utah to levy a tax in the instant case and that to do so would result in this Court's ascribing to that term a meaning wholly unintended and unwarranted.

4. Distinction Between Stocks and Bonds

In the discussion of this problem, we believe it to be highly important to distinguish clearly between stocks on the one hand and bonds (as well as other evidences of debt) on the other. We are here concerned only with the question of the taxability of the transfer at death of shares of stock in a Utah corporation. We are not concerned with the problem of whether bonds of a Utah corporation would be taxable under similar circumstances. There is a real, substantial distinction between the fundamental characteristics of stocks as compared to bonds — a distinction which has been universally recognized.

This distinction is well stated in the case of *In re Bronson*, (1896) 150 N. Y. 1, 44 N. E. 707, in which the court said at pages 708-9 of 44 N. E.:

> "The attitude of a holder of shares of capital stock is quite other than that of a holder of bonds towards the corporation which issued them. While the bondholders are simply creditors, whose concern with the corporation is limited to the fulfillment of its particular obligation, the shareholders are persons who are interested in the operation of the corporate property and franchises, and their shares actually represent undivided interests in the corporate enterprise. * * * Each share represents a distinct interest in the whole of the corporate property. * * * The attempt to tax a debt of the corporation to a nonresident of the state, as being property within the state, is one thing, and the imposition of a tax upon the transfer of any interest in or right to the corporate property itself is another thing. The corporation is the creation of state laws, and those who become its members, as shareholders, are subject to the operation

of those laws, with respect to any limitation upon their property rights, and with respect to the right to assess their property interests for purposes of taxation."

In other words, a bondholder is a creditor of the corporation. The bond represents a debtor-creditor relationship. It may well be that there is nothing in the nature of wealth in the state of incorporation so far as a bond is concerned, for the corporation owes the amount of money represented by the bond to the bondholder. So far, therefore, as the state of incorporation is concerned, it might be argued that the bond represents a minus or negative wealth and that the only situs (if a "situs" there must be when dealing with intangibles) of any plus or positive wealth is at the domicile of the creditor.

On the other hand, a share of stock is a partial ownership of the corporation. The stockholder has a right to a share of the profits, a right to a voice in the management (depending, of course, upon the type of stock held), and a right to a proportionate share of the assets of the corporation upon dissolution. The corporation does not owe the stockholder anything in the sense of owing a debt. The stockholder is simply one of the owners of the corporation.

The stock certificate is, we submit, unimportant in the consideration of this case. The certificate is nothing more than a muniment of title, the paper evidence of the bundle of rights making up a share. It is the share, not the certificate, which, for our purposes at least, is the thing of value, the property. See Fletcher, *Cyclopedia Corporations*, Permanent Edition, Vol. 11, sec. 5096, especially at page 76; *Burnet* v. *Brooks*, *supra*.

Every state court of last resort to which this tax problem was presented, and this Court prior to *First National Bank of Boston* v. *Maine*, *supra*, recognized and carefully applied this distinction and held the transfer at death of stock in domestic corporations owned by nonresident decedents taxable under death duty statutes identical

so far as here material, with the Utah law. See collection of cases at 42 *A. L. R.* 365; see also cases treated under point 5 of this argument. Most of the state courts, as well as this Honorable Court prior to the First National Bank case, held the transfer of bonds under similar circumstances not taxable, but only after a careful analysis of the distinction we here urge. *In re Bronson, supra;* compare *Larson* v. *MacMiller, supra,* to *McLaughlin* v. *Cluff,* (1925) 66 Utah 245, 240 Pac. 161. Some state court decisions allowed the taxation of the transfer of bonds as well as stocks. See 42 *A. L. R.* 355, *et seq.,* especially at 357 for a collection of cases on the taxation of the transfer of bonds.

The departure by this Honorable Court from the application of this rule of distinction in the First National Bank decision was an unwarranted refusal to recognize and apply a firmly established and well grounded principle of law. This Court should now return to a recognition of this distinction. In so doing, this Court could reverse *First National Bank of Boston* v. *Maine, supra,* without disturbing the line of cases represented by *Farmers Loan & Trust Company* v. *Minnesota,* (1930) 280 U. S. 204, 74 L. ed. 371, 50 S. Ct. 98. That line of cases might be supportable on the theory of there being no positive wealth in the state of the domicile of the debtor; therefore, there is nothing of value transferred within the tax jurisdiction of that state; therefore, for such state to attempt to tax the transfer of a bond (or other evidence of a debt) would be an attempt to exercise extraterritorial jurisdiction which would be invalid under the Federal Constitution.

But to apply that reasoning to the transfer of a share of stock is, we submit, erroneous. The share of stock does represent positive wealth in the state of incorporation. That state is the domicile of the corporation. See *Cream of Wheat Co.* v. *Grand Forks, supra,* where it was stated at page 328 of 253 U. S.:

> "The company was confessedly domiciled in North Dakota; for it was incorporated under the laws of

> that State. As said by Mr. Chief Justice Taney, 'It must dwell in the place *of its creation, and cannot migrate to another sovereignty.*' * * * The fact that its property and business were entirely in another State did not make it any the less subject to taxation in the State of its domicile." (Italics ours.)

That state admittedly (see page 7 of respondents' brief in opposition to petition for writ of certiorari) has jurisdiction over the shares. Otherwise how could it levy a property tax upon such shares? *Corry* v. *Baltimore*, (1905) 196 U. S. 466, 49 L. ed. 556, 25 S. Ct. 297; *Schuylkill Trust Co.* v. *Pennsylvania*, (1938) 302 U. S. 506, 82 L. ed. 392, 58 S. Ct. 295.

In *Schuylkill Trust Co.* v. *Pennsylvania, supra*, this Court in upholding a tax by Pennsylvania on the shares of stock of domestic corporations regardless of the domicile of the owner, said at page 516 of 302 U. S.:

> "Moreover, the shares represent a property interest * * *. *The shareholders, whether domestic or foreign, depend for the preservation and protection of this property upon the law of the state of the corporation's domicile.* The property right so represented is of value, arises where the corporation has its home, *and is therefore within the taxing jurisdiction of that state; and this, notwithstanding the ownership of the stock may also be a taxable subject in another state.*" (Italics ours.)

Having such jurisdiction, and there being positive wealth present in the state of incorporation, the distinction must be recognized and applied. The result would be validity of the tax levy here proposed.

5. The Law Prior to First National Bank of Boston v. Maine

Before the decision of this Honorable Court in *First National Bank of Boston* v. *Maine, supra*, there was apparently no question in any court, including this Court as demonstrated by prior pronouncements, of the jurisdiction and power of the state of incorporation to tax, under death duty statutes, the transfer of shares of stock in

a domestic corporation owned by nonresident decedents at date of death. With one exception, Louisiana, the court of last resort of every state to which the problem was presented found in favor of the tax.

With regard to Louisiana, a marked difference in the statutory provisions existed which sharply differentiates the decision of that state supreme court. The Louisiana statute provided as follows:

> "* * * said tax shall be imposed with respect to all property * * * embraced in any inheritance, * * * including all personal property *physically* in the state, * * * whether owned or inherited by * * * a resident or nonresident * * *." See page 344 of 109 So.

In *Newell* v. *Tremont Lumber Company*, (1926) 161 La. 649, 109 So. 344, the Supreme Court of Louisiana held that shares of stock in Louisiana corporations owned by nonresident decedents, the certificates of stock being held at the domicile of such resident, were not subject to tax under the Louisiana statute. The court, of course, placed great stress on the use of the word "physically" in the statute. The use of the word "physically" must have been intentional upon the part of the Louisiana Legislature. The statutes of all other states which had ruled upon this problem contain no such limitation but, on the contrary, demonstrate a clear intent to tax the transfer of intangible property which is in any manner within the jurisdiction of the taxing sovereign. It would appear that perhaps Louisiana could not tax any intangibles owned by nonresident decedents, regardless of the type of tax situs the intangible might have within the State of Louisiana, under such a statute, for the obvious reason that to attempt to ascribe a physical location to an intangible is to be met at the very threshhold by a contradiction in terms. An intangible, it would seem, can have no *physical* situs anywhere, for lack of physical being is the very attribute of an intangible which distinguishes it from a tangible.

Other than this one decision from Louisiana, the bench of this country was unanimous in holding such transfers taxable under statutes similar to that of Utah.

For example, the Maine statute under which the Supreme Court of Maine held taxable the transfer of the stock in *State* v. *First National Bank of Boston, supra,* read thus:

> "All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will, by the intestate laws of this state, * * * shall be subject to an inheritance tax for the use of the state as hereinafter provided * * *." Rev. Stat. Me., c. 69, sec. 1.

The New York statute under which *In re Bronson, supra,* was decided provided for a tax upon the transfer of property:

> "When the transfer is by will or by the intestate laws of this state from a resident decedent; or when the transfer is * * * of property within this state and the decedent was a nonresident at the time of his death." See page 707 of 44 N. E.

The Massachusetts statute considered in *Greves* v. *Shaw,* (1899) 173 Mass. 205, 53 N. E. 372, provided for a tax on the transfer of:

> "* * * all property within the jurisdiction of the commonwealth and any interest therein, whether belonging to inhabitants of the commonwealth or not, and whether tangible or intangible." See 53 N. E. 372.

The comparable provisions of the Utah statute are as follows:

Sec. 80-12-2:

> "A tax equal to the sum of the following percentages of the market value of the net estate shall be imposed upon the transfer of the net estate of every decedent, *whether a resident or nonresident of this state:* * * *." (Italics ours.)

Sec. 80-12-3:

> "The value of the gross estate of a decedent shall be determined by including the value at the time of his death of *all property, real or personal, within the jurisdiction of this state, and any interest therein, whether tangible or intangible, which shall pass to any person, in trust or otherwise, by testamentary disposition or by law of inheritance or succession of this or any other state or country,* or by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after his death." (Italics ours.)

If any substantial difference exists between the Utah statute and the other representative statutes quoted, it is that the Utah statute more clearly embraces within its terms such transfers as those in the case at bar. It clearly contemplates the taxation of every conceivable type of interest within the jurisdiction of the State of Utah transferred as a result of the death of the owner, regardless of what sovereign may regulate the succession to the property. These provisions have existed in the Utah law since it was first enacted.

Prior to the First National Bank decision, the State of Utah, through the office of the Attorney General of Utah, assessed its estate tax against the transfer at death of stock in Utah corporations owned by nonresident decedents. *Aldrich, et al.* v. *State Tax Commission,* (1941) ..... Utah ....., 116 Pac. (2nd) 923. Such a tax was sustained by the Utah Supreme Court in a case in which the facts were identical, even to the stock involved. *Larson* v. *MacMiller, supra.* While it is true that in Larson v. MacMiller the question of the jurisdiction of the State of Utah to levy the tax was not directly raised, nevertheless, that court sustained the tax under identical circumstances.

Similarly, the Supreme Courts of at least fifteen states, including Utah, and one territory (Hawaii), had upheld

the right of the state of incorporation to levy an inheritance or estate tax upon the transfer at death of stock of domestic corporations owned by nonresident decedents. See 42 *A. L. R.* 365, *et seq.; State* v. *First National Bank of Boston, supra;* see also Fletcher, *Cyclopedia Corporations,* Permanent Edition, Vol. 14, Section 6981, especially at page 631.

In the interest of brevity, only a few of the cases collected at 42 *A. L. R.* 364 will be discussed but the Court is respectfully referred to the cases there cited for a complete picture of the universality of the law on this problem before *First National Bank of Boston* v. *Maine.*

One of these state court decisions is particularly interesting from an historical as well as a legal standpoint. In *Greves* v. *Shaw,* (1899) 173 Mass. 205, 53 N. E. 372, the Supreme Judicial Court of Massachusetts had before it exactly the problem presented to this Court. Their statute, so far as material, was the same as Utah's and subjected to tax "all property within the jurisdiction of the commonwealth and any interest therein, whether belonging to inhabitants of the commonwealth or not, and whether tangible or intangible". At page 372 of 53 N. E. the Massachusetts court stated:

> "There can be no doubt that stock in corporations organized under the laws of this commonwealth * * * is property within the jurisdiction of the commonwealth, within the meaning of this statute. * * * Cases cited. * * * Such a corporation, being in a sense a citizen of this state, and having an abiding place here akin to the domicile of a natural person, is subject to the jurisdiction of the commonwealth, and is in fact within the commonwealth. The stockholders are the proprietors of the corporation, which is itself the proprietor of the property owned and used for the ultimate benefit of the stockholders. While the corporation has a full and complete legal title to the corporate property, its ownership is in a sense fiduciary; for, on winding up its affairs, the surplus after the payment of debts must be divided among the stockholders. * * * That the certificates

in the present case were in the State of New York at the time of the death of the testatrix is immaterial."

Historically, the case is interesting by reason of the fact that the trial judge in the case is shown in the reported decision to have been one Oliver W. Holmes. This same Oliver W. Holmes, later better known as Oliver Wendell Holmes, and respected and revered as one of the greatest legal minds ever produced in this country, joined in the dissenting opinion in *First National Bank of Boston* v. *Maine*, decided thirty-three years after he had held, as a Bristol County Supreme Judicial Court judge in Massachusetts, that the state of domicile of the corporation could tax the transfer, under a death duty tax law, of stock in the corporation owned by nonresident decedents.

Legally, the case is interesting for the clarity of the language in which it expresses the opinion. We submit that the propositions announced are sound.

Another of the state cases sustaining the tax for which the state here contends is that of *In re Bronson*, *supra*. In the Bronson case the question of the taxability of the transfer of both stocks and bonds of domestic corporations owned by nonresident decedents was presented. The majority of the court held that the transfer of the bonds was not taxable but, after clearly distinguishing between stocks and bonds, held the stock transfers to be taxable under the New York death duty law. There was a vigorous dissent in this Bronson case, but interestingly enough, the dissent was not upon the ground that the stock transfer was not taxable by the State of New York; the dissenters agreed wholeheartedly with the majority that the stock was includable in the New York estate, but dissented from the holding that the transfer of the bonds was not taxable, contending, with what was at least logical and legal reasoning, that the bond transfers, too, should be held subject to tax.

In *Security Trust Co.* v. *Edwards*, (1917) 90 N. J. L. 558, 101 Atl. 384, the Court of Errors and Appeals of New Jersey said at 101 Atl. 386:

"Now the doctrine is too well established to need discussion that the stock of a New Jersey corporation has a situs in this state and is subject to succession taxation here. Dixon v. Russell, 79 N. J. Law, 490, 76 Atl. 982 (Court of Errors); Carr v. Edwards, 84 N. J. Law, 667, 87 Atl. 132; Hopper v. Edwards, 88 N. J. Law, 471, 96 Atl. 667.

"The matter is nowhere more fully and ably discussed than in the opinion of Mr. Justice Garrison in the Supreme Court in Neilson v. Russell, 76 N. J. Law, 27, 69 Atl. 476 (1908), reversed on another point, 76 N. J. Law, 655, 71 Atl. 286, 19 L. R. A. (N. S.) 887, 131 Am. St. Rep. 673 (1908). The following is quoted therefrom, not for the purpose of supporting this elementary proposition, but as illuminating the precise question under review in the present case (76 N. J. Law, page 35, 69 Atl. page 479):

> 'In this country, where the general doctrine of the state courts is that the situs of property governs its liability to succession taxes, the weight of authority is that stock in a corporation is subject to the imposition of succession taxes by the state that created the corporation, and that in this regard the place of residence of the deceased stockholder is immaterial.' "

This same result was reached and much the same reasoning applied in all the other state court decisions prior to *First National Bank* v. *Maine, supra.* There was no dissent among the legal minds of our country, as represented on the bench, as to the principle that the transfer of stock of domestic corporations owned by nonresident decedents was subject to death duty tax by the state of the corporate domicile.

In 1919 this Honorable Court rendered a decision in connection with two cases which came to it from the state courts of New Jersey and which presented exactly the problem presented in this case. *Maxwell* v. *Bugbee* (companion case, *Hill v. Bugbee*), (1919) 250 U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2. The representatives of the estate made the same arguments there as will be made by respondents

here in opposition to the tax. The Court summarized that argument at 250 U. S. 535 as follows:

> "Counsel for plaintiffs in error sum up their objections to the statute, based on the Federal Constitution, as follows: * * * (3) It taxes the transfer of a nonresident's property over which the State of New Jersey has no jurisdiction * * *."

This Court then proceeded to uphold the tax levied by the State of New Jersey upon the transfer of shares of stock of New Jersey corporations owned by nonresident decedents and experienced no apparent legal difficulty in reaching its conclusion. Mr. Justice Holmes dissented from the majority, not upon the ground that the transfer of New Jersey stock was not subject to tax by New Jersey, but solely upon the ground that the method of computing the tax was erroneous. Upon the question of the jurisdiction or power of the State of New Jersey to levy the tax upon the transfer of stock in New Jersey corporations, the opinion of this Court was unanimous.

Further discussion of the state court decisions prior to *First National Bank of Boston* v. *Maine* would serve no purpose other than repetition. Suffice it to say that the proposition that the state of incorporation could tax the transfer of shares of stock of a domestic corporation under death duty taxes was uncontroverted and unanimously approved.

The state courts, however, were not alone in their position that the state of incorporation could tax under the present circumstances. This Court in several cases had specifically and with careful, exact language upheld this very right. One example has already been given in the *Maxwell* v. *Bugbee* case, *supra*.

In the case of *Frick* v. *Pennsylvania*, (1925) 268 U. S. 473, 497, 69 L. ed. 1058, 45 S. Ct. 603, this Court said:

> "The decedent owned many stocks in corporations of States, other than Pennsylvania, which subjected their transfer on death to a tax and prescribed means

of enforcement which practically gave those States the status of lienors in possession. *As those States had created the corporations issuing the stocks, they had power to impose the tax and to enforce it by such means, irrespective of the decedent's domicile and the actual situs of the stock of certificates.* Pennsylvania's jurisdiction over the stocks necessarily was subordinate to that power. Therefore to bring them into the administration in that State it was essential that the tax be paid." (Italics ours.)

In the *Frick* case the decedent was a resident of Pennsylvania and, as evidenced by the quotation, owned stocks in corporations of other states. The Court held, as indicated, that the death duty taxes imposed by the states of incorporation were valid and went on to hold that the value of the stock in these corporations for the purpose of the Pennsylvania inheritance tax was the value of the stocks less the amount of tax paid in the other jurisdictions. It is again to be noted that this opinion was unanimous.

In *Rhode Island Hospital Trust Company* v. *Doughton*, (1926) 270 U. S. 69, 70 L. ed. 475, 46 S. Ct. 256, the decedent was a resident of the State of Rhode Island. He owned stock in a New Jersey corporation. Two-thirds of the property of the New Jersey corporation consisted of real estate in the State of North Carolina. North Carolina attempted to assess its inheritance tax upon two-thirds of the value of the stock owned in the New Jersey corporation by the Rhode Island decedent. This Honorable Court denied to North Carolina the right to tax the transfer of the stock but held that both the state of the decedent's domicile and the state of incorporation could validly levy a death duty tax upon the transfer of the stock, stating at pages 80-81 of 270 U. S.:

"The tax here is not upon property, but upon the right of succession to property, but the principle that the subject to be taxed must be within the jurisdiction of the State applies as well in the case of a transfer tax as in that of a property tax. A State

> has no power to tax the devolution of the property of a non-resident unless it has jurisdiction of the property devolved or transferred. In the matter of intangibles, like choses in action, shares of stock, and bonds, the situs of which is with the owner, a transfer tax of course may be properly levied by the State in which he resides. So, too, it is well established that the State in which a corporation is organized may provide in creating it for the taxation in that State of all its shares, whether owned by residents or non-residents. * * * Cases cited * * *."

And again at page 83, the Court said, referring to jurisdiction for the purpose of taxing the devolution of the shares of stock:

> "That is determined by the laws of Rhode Island where the decedent owner lived or by those of New Jersey, because the shares have a situs in the State of incorporation."

See also *Blackstone* v. *Miller*, (1903) 188 U. S. 189, 47 L. ed. 439, 23 S. Ct. 277 (overruled by *Farmers Loan & Trust Co.* v. *Minnesota, infra*); *Baker* v. *Baker, Eccles & Company*, (1917) 242 U. S. 394, 61 L. ed. 386, 37 S. Ct. 152; see also *Corry* v. *Baltimore, supra; Schuylkill Trust Co.* v. *Pennsylvania, supra.*

At this point, let us digress slightly to treat the question of the materiality of certain facts to which respondents will no doubt refer. These facts, in substance, are that the Union Pacific Railroad Company has its executive offices in New York; only a fractional part of its property is in Utah; only a part of its revenue comes from business transacted in Utah; only a part of its trackage is in Utah; it chose to keep its stock books and records and its transfer agent in New York. In order to simplify and expedite the proceedings and in order that there be no superfluous motions to strike or other pleadings interposed to encumber the record and prolong the litigation, petitioners admitted the existence of these facts subject to the contention and reservation that such facts were immaterial and irrelevant.

As previously stated, petitioners have maintained throughout all stages of this litigation that such facts were immaterial and irrelevant.

The decision of this Court in *Rhode Island Hospital Trust Company* v. *Doughton, supra,* conclusively demonstrates that such factual allegations are immaterial to the issues herein presented. Furthermore, petitioners are not attempting to tax the property owned by the corporation; nor to tax the income earned by the corporation; nor to measure the extent of the corporate activities; nor to tax a transfer of registration of stock certificates upon the books of the corporation. Petitioners here contend for the right of the State of Utah to tax the transfer at death of *shares* (not certificate registration, not corporate property) in a corporation of that State; shares whose life and existence are the result of Utah law; shares which are the creatures, the very children of Utah.

Respondents will undoubtedly cite the Court to the cases of *Farmers Loan and Trust Company* v. *Minnesota,* (1930) 280 U. S. 204, 74 L. ed. 371, 50 S. Ct. 98; *Baldwin* v. *Missouri,* (1930) 281 U. S. 586, 74 L. ed. 1056, 50 S. Ct. 436; *Beidler* v. *South Carolina Tax Commission,* (1930) 282 U. S. 1, 75 L. ed. 131, 51 S. Ct. 54. These cases will be discussed more fully in our treatment of the First National Bank of Boston v. Maine case under point 6. At this time we deem it sufficient to say that it is our position that none of these cases in any way invalidates the tax which the State here proposes to assess. The *Farmers Loan and Trust Company* case, *supra,* involved the taxability of bonds of a Minnesota corporation owned by a nonresident. The *Baldwin* case, *supra,* treated the taxation by Missouri of bonds and promissory notes, the paper evidences of which were in Missouri, and bank deposits in Missouri banks owned by a resident of Illinois. The *Beidler* case, *supra,* dealt with the taxation by the State of South Carolina of a debt owing to a resident of Illinois by a South Carolina corporation. It is thus noted that in all three of these cases the question was the

same, namely, the jurisdiction of a state to tax the transfer of a *debt* of a domiciliary of either that state or a state other than the creditor's domicile, owing to a nonresident, and in all three cases this Court held that the state of the debtor's domicile could not tax. We have heretofore pointed out the difference between debts as represented by bonds, promissory notes, bank deposits, open accounts, on the one hand, and shares of stock on the other. With this distinction we do not now quarrel, but urge this Court to again accept it. It was recognized throughout the history of this problem by the same courts which held the transfer of stock of domestic corporations subject to tax, including this Court.

It is worthy of note that vigorous dissents are made to all of these latter three cases by Justices Holmes, Brandeis and Stone, which will be analyzed later in this brief.

It is further interesting to note that in the *Beidler* case, *supra*, the representatives of the Illinois decedent's estate paid without contest the tax upon the transfer of shares of stock owned by the Illinois resident in the South Carolina company; and this Honorable Court again, we submit, as late as 1930, recognized the right of the state of incorporation to levy such a transfer tax. In the course of its opinion at page 9 of 282 U. S. this Court stated:

> "The interest of the decedent as a stockholder was a distinct interest, and the estate of the decedent has been taxed by South Carolina upon the transfer of his stock according to its agreed value. With respect to the items of indebtedness of the corporation to the decedent, the latter appears upon the record simply as a creditor, with his domicile in Illinois."

Our research on this subject has failed to disclose a single case in any jurisdiction, prior to First National Bank of Boston v. Maine, holding that the state of the corporation's domicile could not levy an estate or inheritance tax under factual and statutory circumstances comparable to the case at bar.

We submit that the reasoning, logic and fundamental soundness of those decisions prior to First National Bank are unanswerable and that this Court should now return to those fundamental principles.

6. The Case of First National Bank of Boston v. Maine

Some of the background of *First National Bank of Boston* v. *Maine* has been discussed above. With every attempt to avoid repetition, let us scrutinize this decision, which, we submit, is no longer law.

In 1903, in *Blackstone* v. *Miller, supra,* it was held by this Court that the State of New York could subject to its death duty tax the transfer of a deposit in a New York trust company to the credit of a decedent who died domiciled in Illinois. This decision stood unchallenged until the case of *Farmers Loan and Trust Company* v. *Minnesota, supra.* In the Farmers Loan and Trust Company case the question was whether the State of Minnesota could levy an inheritance tax upon the transfer of negotiable bonds issued by the State of Minnesota and the cities of Minneapolis and St. Paul to nonresidents of Minnesota. In that case the Court re-examined *Blackstone* v. *Miller, supra,* stated that Blackstone v. Miller could no longer be considered law and specifically overruled it. The basis, however, upon which the Farmers Loan and Trust Company decision was built was that the Fourteenth Amendment to the Constitution of the United States prohibited taxation of the same subject or transfer of property by two states. See page 209 of 280 U. S. Then Justice Stone, now Chief Justice, concurred in the result of the majority in the Farmers Loan and Trust Company case but dissented from the basis of the decision of the majority, namely, the proposition that the Fourteenth Amendment prohibited double taxation, stating at page 215 of 280 U. S.:

> "Hitherto the fact that taxation is 'double' has not been deemed to affect its constitutionality and there are, I think, too many situations in which a

single economic interest may have such legal relationships with different taxing jurisdictions as to justify its taxation in both, to admit of our laying down any constitutional principle broadly prohibiting taxation merely because it is double, at least until that characterization is more precisely defined."

Mr. Justice Stone then went on to attack any such broad pronouncement against prohibiting taxation of the same property or transfer by two states, and reaffirmed *Blackstone* v. *Miller, supra,* so far as that case related to the transfer of a bank account in the state where the bank was located.

Mr. Justice Holmes dissented from the majority opinion and was joined by Mr. Justice Brandeis in expressing the thought that since the laws of the State of Minnesota created the obligation and continued its existence, that state should be allowed to tax its transfer. Justice Holmes also condemned the majority opinion for reading into the Fourteenth Amendment any prohibition against double or multiple taxation and stated at page 218:

"A good deal has to be read into the Fourteenth Amendment to give it any bearing upon this case. The Amendment does not condemn everything that we may think undesirable on economic or social grounds."

Following the decision in the Farmers Loan and Trust Company case, this Court handed down the cases of *Baldwin* v. *Missouri, supra,* and *Beidler* v. *South Carolina Tax Commission, supra.*

The Baldwin case, *supra,* has been referred to above, and at this point we state only that again the basis of the majority opinion was that the Fourteenth Amendment prohibited taxation by two jurisdictions of the same transfer of property. Again Mr. Justice Holmes dissented and was joined in his dissent by Justices Brandeis and Stone. Justice Holmes stated at page 595 of 281 U. S.:

"Although this decision hardly can be called a surprise after *Farmers Loan and Trust Company* v. *Minnesota* * * * and although I stated my views in

those cases, still, as the term is not over, I think it legitimate to add one or two reflections to what I have said before. I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words, 'due process of law,' if taken in their literal meaning, have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass. * * *"

With regard to the taxation by two states of the same transfer of property, Justice Holmes asks the question — What are the grounds upon which the Court struck down the right of Missouri to assess the tax? He answers this question at page 596 in these words:

"Simply, so far as I can see, that it is disagreeable to a bond owner to be taxed in two places. Very probably it might be good policy to restrict taxation to a single place, and perhaps the technical conception of domicil may be the best determinant. But it seems to me that if that result is to be reached it should be reached through understanding among the States, by uniform legislation or otherwise, not by evoking a constitutional prohibition from the void of 'due process of law,' when logic, tradition and authority have united to declare the right of the state to lay the now prohibited tax."

The same situation is presented by the *Beidler* decision, and again the majority of the court places its decision upon the basis that the Fourteenth Amendment prohibits double or multiple taxation.

With this background, this Honorable Court considered the case of *First National Bank of Boston* v. *Maine, supra.*

The facts in the First National Bank case were, so far as material, identical with those in the case at bar. The decedent was a resident of the State of Massachusetts. He owned, at the date of death, shares of stock in the Great Northern Paper Company, a Maine corporation. Massachusetts subjected the transfer of the shares of this stock to its inheritance tax which was paid by the estate. The State of Maine, however, refused to allow the transfer of the shares of stock until tax was paid upon the transfer under the Maine inheritance law which was substantially the same as that of Utah. The representative of the estate paid the tax assessed by the State of Maine and sued to recover. The Supreme Court of Maine upheld the tax and the representative of the estate appealed to the Supreme Court of the United States. The majority opinion of this Court reviewed the cases of *Blackstone* v. *Miller, supra, Farmers Loan and Trust Company* v. *Minnesota, supra, Frick* v. *Pennsylvania, supra,* and other cases. After this review the majority reached the conclusion that the Fourteenth Amendment prohibited the taxing by two jurisdictions of the same transfer of intangibles.

Referring to the Farmers Loan and Trust Company case the majority opinion states at page 324-5 of 284 U. S.:

> "The view that two states have power to tax the same transfer on different and inconsistent principles was distinctly rejected; and the general reasons which support the rule that tangibles and their testamentary transfer may be taxed only by the state where they are found were held to be sufficient to inhibit the taxation by two states of intangibles with a taxable *situs* imposed by due application of the *mobilia* maxim."

Again at page 327 the majority said:

> "* * * and it is unreasonable, and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states."

The opinion then, at pages 327 and 328, recognized the established principle that there are differences between bonds and stocks and that such differences might justify placing bonds in a different category from stocks for some purposes. However, the comment was then made that for the purpose of taxation such a difference, in the opinion of the majority of the Court, was inconsequential. Therein lies the first error of that opinion. (See, also, argument under point 4 of this brief.) The opinion then concludes at page 328:

> "We conclude that shares of stock, like the other intangibles, constitutionally can be subjected to a death transfer tax by one state only."

It is submitted, therefore, that the basis upon which the First National Bank decision must stand or fall is that the Fourteenth Amendment prohibits the taxation of the transfer of the same intangibles by two states; that it prohibits what has been called "double taxation". And therein lies what we submit is the second and really fundamental error in that opinion.

Having concluded that only one state could tax the transfer, the majority then proceeded to give reasons in support of allowing only the state of the domicile of the owner to tax, reaching the final result that the State of Maine was constitutionally prohibited by the Fourteenth Amendment from assessing the tax in question because Massachusetts could and did assess a tax upon the same transfer.

Because of the importance of this point, we repeat that a careful study of the majority opinion in the First National Bank case, as well as the cases upon which it relies,

demonstrates that the fundamental basis of the decision is that the Fourteenth Amendment prohibits taxation of the same event by more than one state. We state that this is important because, as has been and as will be demonstrated, this underlying principle of the First National Bank decision has been specifically denounced by this Honorable Court upon many occasions and overruled by more recent decisions.

Before leaving the First National Bank case, however, let us consider the dissenting opinion by Mr. Justice Stone in which he is joined by Justices Holmes and Brandeis.

Justice Stone vigorously dissents upon the ground that nothing in the Fourteenth Amendment and nothing in any prior decision of the Supreme Court of the United States, which was necessary to the decision, requires the holding that the Fourteenth Amendment prohibits taxation of the same event by two states. At page 332 Justice Stone states:

> "Such want of logic as there may be in taxing the transfer of stock of a nonresident at the home of the corporation results from ascribing a *situs* to the shareholder's intangible interest which, because of their very want of physical characteristics, can have no *situs*, and again in saying that the rights, powers, and privileges incident to stock ownership and transfer which are actually enjoyed in two taxing jurisdictions, have *situs* in one and not in the other. *Situs* of an intangible, for taxing purposes, as the decisions of this Court, including the present one, abundantly demonstrate, is not a dominating reality, but a convenient fiction which may be judicially employed or discarded, according to the result desired.
>
> "The decedent, if we disregard the fiction and its attendant maxims, acquired rights and privileges with respect to a corporation created by Maine and under its control. The nature and extent of his interest are defined by the laws of Maine, and his power to secure the complete transfer of it is dependent upon them. These characteristics of corporate shares, distinguishing them in several respects from unsecured obligations to pay money, have long been explicitly recog-

nized by this Court as the source of state power to tax nonresident stockholders and as sufficient ground for its exercise. See *Frick* v. *Pennsylvania*, 268 U. S. 473, 497; *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 401; *Hawley* v. *Malden*, 232 U. S. 1, 12; *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. 69, 81. See also *Corry* v. *Baltimore*, 196 U. S. 466. Compare *Citizens National Bank* v. *Durr*, 257 U. S. 99; *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325."

Again at page 333 Justice Stone uses the following language:

"The present tax is not double in the sense that it is added to that imposed by Massachusetts, since the Maine statute directs that the latter be deducted from the former. But, as the stockholder could secure complete protection and effect a complete transfer of his interest only by invoking the laws of both states, I am aware of no principle of constitutional interpretation which would enable us to say that taxation by both states, reaching the same economic interest with respect to which he has sought and secured the benefits of the laws of both, is so arbitrary or oppressive as to merit condemnation as a denial of due process of law. Only by recourse to a form of words — saying that there is no taxable subject within the state, by reason of the fictitious attribution to the intangible interest of the stockholder of a location elsewhere, — is it possible to stigmatize the tax as arbitrary."

The dissent also points out at page 334 what we submit is an underlying failure by the majority opinion to recognize proper limits to judicial power:

"Even if it be assumed that some protection from multiple taxation, which the Constitution has failed to provide, is desirable, and that this Court is free to supply it, that result would seem more likely to be attained, without injustice to the states, by familiar types of reciprocal state legislation, than by stretching the due process clause to cover this case."

This latter point, manifest in the language of Mr. Justice Stone, brings up what we conceive to be another

powerful argument in favor of allowing the assessment of a tax in the present case. (See also the dissent of Mr. Justice Holmes in *Baldwin* v. *Missouri, supra.*)

At the time the First National Bank of Boston case was decided many of the states of the Union had passed reciprocal legislation which, in effect, provided that intangibles would not be taxed by a state other than the owner's domicile if like privileges were granted by the laws of such domiciliary state. See pages 327-328 of 284 U. S.; see also 53 *Harvard Law Review* 69-70.

At the present time there are at least thirty states which have either reciprocal provisions in their statutes or absolute prohibition against taxing intangibles of non-residents. If this problem is a proper or fit subject for legislation then it is submitted that the levy of the tax under the present circumstances is not unconstitutional. Otherwise, if the levy of the tax is unconstitutional, such legislation is merely a vain gesture and completely superfluous. We submit that "legislative legislation" is the proper method to be used in meeting any objection there may be to such multiple taxation, not "judicial legislation" under the guise of interpreting the Fourteenth Amendment.

See, also, authorities and argument under point 3 hereof.

In concluding our treatment of the First National Bank case as such, we submit that the decision was an unwarranted departure from firmly established principles of law; that the result was not necessarily or properly reached because of prior decisions; and that the reasoning of majority is legally unsound.

7. First National Bank of Boston v. Maine Is No Longer Law

Regardless, however, of the question of the soundness of the First National Bank decision, we submit that the principles upon which the decision rests have been denounced and reversed by later decisions of this Honorable Court and that, therefore, the decision itself has been overruled. Foremost among the decisions from which

we draw the above conclusion are the cases of *Curry* v. *McCanless*, 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900, and *Graves* v. *Elliott*, 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913 (both decided May 29, 1939).

Since these cases are substantially the same we will limit our discussion to *Curry* v. *McCanless*. In that case the decedent was a resident of Tennessee at the date of death. During her lifetime she had created an otherwise taxable trust, naming an Alabama corporation as trustee. She transferred certain stocks and bonds to the trustee to hold the intangibles in trust in Alabama. Upon her death the question arose between Tennessee and Alabama as to which state had the power to levy a death tax upon the transfer of the trust property. By what appears to have been a "friendly suit" the situation was presented to the Tennessee courts and the Supreme Court of Tennessee held that the trust property was taxable in Tennessee and not taxable in Alabama. Throughout the proceedings, in both the state courts and this Court, apparently interpreting the First National Bank case as we have in this brief, the Tennessee Supreme Court and the two states conceded that only one of them could tax the transfer. See 307 U. S. 362. When the case reached the Supreme Court of the United States, however, the decision of this Court was that *both* Tennessee and Alabama could tax the transfer of the same intangibles.

This Court specifically repudiated the principle that the Fourteenth Amendment prohibits more than one from taxing the same transfer of intangibles and stated at pages 372-373:

> "We can find nothing in the history of the Fourteenth Amendment and no support in reason, principle, or authority for saying that it prohibits either state, in the circumstances of this case, from laying the tax. On the contrary this Court, in sustaining the tax at the place of domicile in a case like the present, has declared that both the decedent's domicile and that of the trustee are free to tax. * * * We have recently

> declined to press to a logical extreme the doctrine that the Fourteenth Amendment may be invoked to compel the taxation of intangibles by only a single state by attributing to them a situs within that state. We think it cannot be pressed so far here."

At pages 373-374 Justice Stone speaks out again in unmistakable criticism of previous decisions which, based on the Fourteenth Amendment, proscribed by artificialities the power of the states to tax intangibles or the transfer thereof by ascribing fictional limitations to the due process clause:

> "If we enjoyed the freedom of the framers it is possible that we might, in the light of experience, devise a more equitable system of taxation than that which they gave us. But we are convinced that that end cannot be attained by the device of ascribing to intangibles in every case a locus for taxation in a single state despite the multiple legal interests to which they may give rise and despite the control over them or their transmission by any other state and its legitimate interests in taxing the one or the other. While fictions are sometimes invented in order to realize the judicial conception of justice, we cannot define the constitutional guaranty in terms of a fiction so unrelated to reality without creating as many tax injustices as we would avoid and without exercising a power to remake constitutional provisions which the Constitution has not given to the courts."

Notice the similarity of language and the familiarity of the theme and theory of this opinion, which is now the majority opinion of this Court, when compared with the dissents of Justice Holmes and Justice Stone in the *Farmers Loan and Trust Company* v. *Minnesota*, *Baldwin* v. *Missouri*, *Beidler* v. *South Carolina*, and *First National Bank of Boston* cases, *supra*. The underlying principles of those dissents were that the Fourteenth Amendment did not prohibit taxation of the transfer of the same intangibles by more than one state and, however desirable the result might be in the minds of the Court, the Court

had no power to remake the constitution. Those same theories are the very heart of *Curry* v. *McCanless*.

At the time the dissents were written in those previous cases, by reason of numerical majority, the dissents were merely "voices crying out in the wilderness". Those voices, however, have now become the majority expression of this Court through one of the spokesmen, still a member of the Court, who joined in those previous dissents. *Mr. Justice Stone wrote the majority opinion in the Curry v. McCanless case.*

Referring further to the *Curry* v. *McCanless* decision, we find other expressions from which we conclude that First National Bank of Boston is no longer law and which herald a new approach to constitutional questions. At 307 U. S. 365-366, the Court states:

> "Such rights (referring to intangibles) are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. * * * Obviously, as sources of actual or potential wealth — which is an appropriate measure of any tax imposed on ownership or its exercise — they cannot be dissociated from the persons from whose relationships they are derived. These are not in any sense fictions. They are indisputable realities.
>
> "* * * this does not mean that the sovereign power of the state does not extend over intangibles of a domiciled resident because they have no physical location within its territory, or that its power to tax is lost because we may choose to say they are located elsewhere. A jurisdiction which does not depend on physical presence within the state is not lost by declaring that it is absent." (Parenthetical insertion ours.)

By the above language, the Court sustained the power of the state of the decedent's domicile to tax the intangible's

transfer even though the physical evidence of the intangible was located elsewhere.

The Court then goes on to sustain the tax on the transfer of the same intangible by another state in this language at page 367:

> "* * * when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, *the reason for a single place of taxation no longer obtains,* and the rule is not even a workable substitute for the reasons which may exist in any particular case to support the constitutional power of each state concerned to tax." (Italics ours.)

In the case at bar, the owner of stock of the Union Pacific Railroad Company has availed himself of the protection and benefit of Utah's laws. His investment in a corporation created and existing by virtue of Utah laws receives the protection of those laws; the very existence of his investment, the life blood of his corporation, springs from Utah. He chose, by his act of investing, to avail himself in his choice of property of the protection, benefit and opportunities under Utah law insofar as his intangible property was concerned.

Where two states give protection to the same intangible property, one to the person of the owner and the other to the property by creating and continuing the life of the intangible itself, both states may tax:

> "Whether we regard the right of a state to tax as founded on power over the object taxed, * * * or on the benefit and protection conferred by the taxing sovereignty, or both, it is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax, and *consequently that there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles. Shares of corporate stock may*

be taxed at the domicile of the shareholder and also at that of the corporation which the taxing state has created and controls; and income may be taxed both by the state where it is earned and by the state of the recipient's domicile. Protection, benefit, and power over the subject matter are not confined to either state. * * * taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles." (Italics ours.) Pages 367 and 368 of 307 U. S.

The Court then goes on to strike at the unwarranted curtailment of state power to tax by previous decisions which injected into the Fourteenth Amendment the economic or moral philosophy of the Court by stating at pages 368 and 369:

"The practical obstacles and unwarranted curtailments of state power which may be involved in attemptng to prevent the taxation of diverse legal interests in intangibles in more than a single place, through first ascribing to them a fictitious situs and then invoking the prohibition of the Fourteenth Amendment against their taxation elsewhere, are exemplified by the circumstances of the present case. Here, for reasons of her own, the testatrix, although domiciled in Tennessee and enjoying the benefits of its laws, found it advantageous to create a trust of intangibles in Alabama by vesting legal title to the intangibles and limited powers of control over them in an Alabama trustee. But she also provided that by resort to her power to dispose of property by will, conferred upon her by the law of the domicile, the trust could be terminated and the property pass under the will. *She thus created two sets of legal relationships resulting in distinct intangible rights, the one embodied in the legal ownership by the Alabama trustee of the intangibles, the other embodied in the equitable right of the decedent to control the action of the trustee with respect to the trust property and to compel it to pay over to her the income during her life, and in her power to dispose of the property at death.*" (Italics ours.)

Here, as there, the decedent had availed himself of the protection and benefit of the laws of two states. New York protected and benefited the person of decedent in his chosen domicile. Utah protects the chosen property of decedent. Utah created the intangible rights which decedent owned in the form of shares of stock. Utah gives protection and benefit to those shares and to the corporation in which decedent chose to invest.

And finally there are pointed out the difficulties which arise when an interpretation of the Fourteenth Amendment superimposes thereon the judicial power of decision between states, both having a connection with the incident of tax, as to which should be entitled to levy the tax, indicating again that the courts should not inject their own ideas of wise or economically sound tax policies into the delicate, complicated tax structure through any medium such as the Fourteenth Amendment (pages 369-370):

> "Even if we could rightly regard these various and distinct legal interests, springing from distinct relationships, as a composite unitary interest and ascribe to it a single location in space, it is difficult to see how it could be said to be more in one state than in the other and upon what articulate principle the Fourteenth Amendment could be thought to have withdrawn from either state the taxing jurisdiction which it undoubtedly possessed before the adoption of the Amendment by conferring on one state, at the expense of the other, exclusive jurisdiction to tax. See *Padell* v. *City of New York*, 211 U. S. 446, 448. *If the 'due process' of the Fifth Amendment does not require us to fix a single exclusive place of taxation of intangibles for the benefit of their foreign owner, who is entitled to its protection, Burnet* v. *Brooks*, 288 U. S. 378; cf. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489, *the Fourteenth can hardly be thought to make us do so here, for the due process clause of each amendment is directed at the protection of the individual and he is entitled to its immunity as much against the state as against the national government.*

"If taxation is but a means of distributing the cost of government among those who are subject to its control and who enjoy the protection of its laws * * * legal ownership of the intangibles in Alabama by the Alabama trustee would seem to afford adequate basis for imposing on it a tax measured by their value. * * * And since Alabama may lawfully tax the property in the trustee's hands, we perceive no ground for saying that the Fourteenth Amendment forbids the state to tax the transfer of it or an interest in it to another *merely because the transfer was effected by decedent's testamentary act in another state.*" (Italics ours.)

Note also the care, expressed in the last words quoted above, with which this Court now distinguishes between jurisdiction to tax the transfer of intangibles and the power to regulate the succession thereto. See also *Knowlton* v. *Moore, infra,* and discussion thereunder.

We have quoted at some length from the decision in *Curry* v. *McCanless* for the reason that the case is undoubtedly one of the more important and far reaching recent decisions of the Supreme Court of the United States. As we have stated, the dissents of Justices Holmes, Brandeis, Stone, and others, written in connection with decisions which struck down taxing policies established by the states upon the ground that they violated the Fourteenth Amendment, continuously hammered at the proposition that the majority of the Court in those former opinions was not applying the due process of law clause of the Fourteenth Amendment but was applying rather a superstructure composed of the majority's own philosophy as to tax policies built upon some ethereal and unanswerable interpretation of the phrase "due process". "Ethereal" because no decision ever stated just what due process meant but proceeded to declare invalid any tax levied by a state which smacked of moral or economic unfairness. "Unanswerable" because by not giving a definition or an interpretation of due process, no logical argument could be made against the application of such inarticulate inter-

pretation. It would seem, from a study of earlier decisions of this Court, that the test of due process became a test of whether the Court itself felt that the tax proposed by the state was a wise or just tax. Due process became the peg upon which to hang any decision which could not otherwise be brought within the Constitution and which the majority of the members of the Court felt reached a fair result.

In *Curry* v. *McCanless* we see the thoughts, which had previously "died a-borning" as dissents, now in full flower as the majority opinion of the Court. No longer will or should any court declare unconstitutional any state tax merely because of some idea that the tax may not be fair or that the burden may be over onerous. The policy of the tax, the extent of the burden, upon whom it should fall within reasonable classification, and the advisability of exercising an existent power to tax are all problems to be decided in the forum of the legislature of the particular sovereignty. Into that forum the judiciary should inject itself only when the legislative action has clearly and palpably violated the specific terms and exact language of the constitutional provisions, not when the judiciary feels that the legislature may have been unwise.

On this same line of thought Taylor, *Due Process of Law*, (1917) states with regard to the Fourteenth Amendment as follows on page 260:

> "It was also considered necessary so to limit the scope of the amendment as to prevent the Federal courts from being submerged under a mass of new litigation involving a review of nearly every transaction between the state and its citizens. Its framers had no idea of converting the Supreme Court of the United States into a general court of appeal with jurisdiction so wide and plenary as to enable it to review all cases involving the taking away of life, liberty and property when only questions of equitable consideration or broad ideas of justice are involved. That court remains as before a court not of general but special appeal with power to supervise under the

amendment in question only when the official action of the state has violated either its provisions or those of some act of Congress passed in pursuance of it."

And again at page 261 that author states:

> "The Federal courts have nothing whatever to do with the policy or expediency of state laws, nor is the hardship or injustice of such laws necessarily an objection against their constitutional validity. 'The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act. This principle rests upon the independence of the legislature as one of the co-ordinate departments of the government.' *Angle* v. *Chicago, St. Paul, etc., Railway*, 151 U. S. 1."

See also *Dane* v. *Jackson*, (1921) 256 U. S. 589, 65 L. ed. 1107, 41 S. Ct. 556.

The ultimate test prescribed by this Honorable Court in *Curry* v. *McCanless* to determine if a tax imposed by a state is valid is whether the state has power over the incident of the tax or whether it gives protection, benefit or advantages in connection with the incident of the tax.

Upon any or all of the requirements of this test the State of Utah is entitled to levy the tax of which respondents here complain. Utah has power over the shares of the stock and the transfer thereof by the corporation. Utah has power over the corporation itself. Both the shares and the corporation are creatures of Utah law. Protection, benefit and advantages are given to the corporation and the shares by Utah. Her laws give the shares value, life, transferability. Her laws create and maintain a civilized society in which the corporation is domiciled and in which the shares reside. Her courts are open for protection of the rights of shareholders. Her laws will govern those rights in certain types of suits, regardless of the forum in which the suit is brought.

We therefore submit that analysis of the *Curry* v. *McCanless* decision demonstrates conclusively that it has overruled *First National Bank of Boston* v. *Maine*. It is not logically conceivable for this Honorable Court to have reached the result of *Curry* v. *McCanless*, namely, allowing more than one state constitutionally to tax the transfer of the same intangibles, without necessarily overruling the basic principle of *First National Bank of Boston* v. *Maine*. The First National Bank case, as we have stated, stands for only one underlying principle, namely, that the Fourteenth Amendment permits the taxation of the transfer of intangibles by only one state. Therefore, if this Court was correct in holding that Tennessee, the state of the domicile of the owner of the stock, could tax, then necessarily, in order to apply the principles of the First National Bank case, it should have held that the stock did not have a taxable situs elsewhere. If the Court found that the stock had acquired a business situs or other situs for the purpose of taxation in Alabama, a state other than the owner's domicile, then, by the application of the principles of First National Bank v. Maine, Tennessee had lost its jurisdiction. But the Curry v. McCanless decision sweeps aside the limitations and inhibitions read into the Fourteenth Amendment by the Court in First National Bank of Boston v. Maine and squarely holds, without qualification, that *the Fourteenth Amendment does not prohibit taxation of the transfer of intangibles by more than one state.*

Even the decision of the majority in the First National Bank case recognized, by reason of the apparent difficulty encountered in holding against the tax in that case, that the State of Maine had some sort of jurisdiction. The language of the Court in the Curry v. McCanless case leaves no doubt that the state of incorporation has jurisdiction to levy a death transfer tax upon the stock of the corporations which it has created and continues to give life.

We submit that since the decisions in *Curry* v. *McCanless* and *Graves* v. *Elliott*, *supra*, the status of the law is exactly where it was prior to the decision of the *First National*

Bank of Boston v. *Maine* case. That law, without question, was unanimously to the effect that the state of the domicile of the corporation had jurisdiction to tax under the circumstances of the present case and that the exercise of that jurisdiction to tax was constitutional.

There have been other recent expressions of this Court bearing upon this same problem, only a few of which will be treated here. One such case which we deem of paramount importance is *Newark Fire Insurance Co.* v. *State Board of Tax Appeals,* (1939) 307 U. S. 313, 83 L. ed. 1312, 59 S. Ct. 918. In this case the State of New Jersey had assessed a personal property tax against the appellant, Newark Fire Insurance Company, a New Jersey corporation, and had included within the measure of the tax intangible property which admittedly had acquired a business situs in the State of New York. In fact, the New Jersey Supreme Court held that the state of domicile of the corporation could impose the personal property tax upon intangibles which admittedly had acquired a business situs in another state. See 307 U. S. at page 317. Two opinions were rendered in this decision, in each of which four justices concurred and, therefore, the New Jersey court's decision was affirmed. The opinion of Mr. Justice Frankfurter, in which he was joined by Justices Stone, Black and Douglas, reads in part as follows at pages 323-324:

> "Wise tax policy is one thing; constitutional prohibition quite another. The task of devising means for distributing the burdens of taxation equitably has always challenged the wisdom of the wisest financial statesmen. Never has this been more true than today when wealth has so largely become the capitalization of expectancies derived from a complicated network of human relations. The adjustment of such relationships, with due regard to the promotion of enterprise and to the fiscal needs of different governments with which these relations are entwined, is peculiarly a phase of empirical legislation. It belongs to that range of the experimental activities of government which shoud not be constrained by rigid and artificial legal

concepts. Especially important is it to abstain from intervention within the autonomous area of the legislative taxing power where there is no claim of encroachment by the states upon powers granted to the National Government. It is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended."

Note again the underlying principle of this decision—that the judiciary is not to strike down state legislation merely because the Court considers it unwise from an economic or moral standpoint, but is to be limited in its decision solely by the unembellished terms of the Constitution. The states are to be free to evolve tax policies without apprehension of judicial interference, so long as those tax policies do not clearly and unmistakably violate some exact constitutional provision or encroach upon a field reserved to the Federal Government.

Another far reaching recent decision of this Court is that found in *Wisconsin* v. *J. C. Penney Company,* (1940) 311 U. S. 435, 85 L. ed. 267, 61 S. Ct. 246. There this Court passed upon the constitutionality of a Wisconsin statute by the terms of which every corporation doing business in the State of Wisconsin was assessed, in addition to the regular corporation franchise tax, an additional 3% tax upon the privilege of declaring dividends. This tax was measured by the amount of business done in the State of Wisconsin as compared to the total business of the corporation, and that proportion of all dividends declared was subjected to the Wisconsin tax. The corporation contested the tax upon the grounds of its being an unconstitutional exercise of jurisdiction by Wisconsin for several reasons, among them being that all the activities of the corporation with reference to declaration of dividends were carried on outside the State of Wisconsin, that the books and records of the company were kept outside the State of Wisconsin, that the dividends were payable to persons other than Wisconsin

residents, etc. The Court, however, upheld the constitutionality of the tax, and in the course of the opinion used the following language at pages 444-445 of 311 U. S.:

> "The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.
>
> "Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. 'Taxable event,' 'jurisdiction to tax,' 'business situs,' 'extraterritoriality,' are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. * * *

"* * * Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances, or even occasional deviations over a long course of years, not unnatural in view of the confusing complexities of tax problems, do not alter the limited nature of the function of this Court when state taxes come before it. At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize."

If any doubt remained after the *Curry* v. *McCanless* case, *supra*, as to the constitutionality of a tax such as the one proposed in the present case, such doubt certainly was removed by the *Newark Fire* and *J. C. Penney Company* decisions. No one can interpret the language used in the course of the latter opinions otherwise than to give constitutional jurisdiction to the State of Utah in a case such as the present.

These latter decisions lay down the unequivocal rule that the only test to be applied in determining the constitutionality of a state tax statute is whether the taxing power exerted by the state "bears fiscal relation to protection, opportunities and benefits given by the state." No one can deny that the State of Utah has given protection, benefits and opportunities in connection with the levy of the tax in the case at bar. The State of Utah created the corporation and the shares. Its laws continue to give them life. Its laws protect their existence and give the stockholders of the corporation the benefit of having the corporation and shares exist and live in, and their investment protected by, the laws of "an orderly, civilized society".

See also *Commonwealth* v. *Stewart*, (1940) 338 Pa. 9, 12 Atl. (2d) 444; affirmed by United States Supreme Court at 312 U. S. 649, 85 L. ed. 1101.

It is therefore submitted that the basis on which the *First National Bank of Boston* v. *Maine* decision stood has been wiped out by these and other later decisions of the United States Supreme Court.

Before leaving this phase of the problem, let us consider two other arguments to the favor of the constitutionality of the tax in question. The State of New York, as well as many other states, levies what is denoted a stock transfer tax. See *Baldwin's New York Consolidated Laws, Ann.*, 1938, Tax Law, Art. 12, sec. 270. By the terms thereof, every transfer of stock in a New York corporation is subjected to a transfer tax. One rate of tax is applied to transfers by sale or exchange. Another rate of tax is applied to transfers by gift or bequest. This type of tax has been sustained so far as its constitutionality is concerned (see annotations to sec. 270 of New York Tax Law, *supra*), and the tax is levied and collected regardless of where the actual transfer, considering only the relations between the buyer and the seller or the donor and the donee, is consummated. See also *Curry* v. *McCanless, supra*. In other words X may sell stock in a New York corporation to Z, the entire transaction taking place in the State of Utah. Nevertheless, the corporation, when asked to transfer the stock on its books, will require the payment of the New York transfer tax. It is important to note also that different rates of tax are applied, as stated, depending upon whether the transfer is the result of a sale or a bequest.

It has long been recognized that a taxing sovereignty may tax one type of transaction or one class of individuals and not tax another type of transfer or class of individuals so long as the classification used in determining the incident of tax or upon whom the burden will fall is reasonable. See 12 *Am. Jur.* "*Constitutional Law*," secs. 476, *et seq.*; note at 58 L. ed. 1030 and cases cited.

The tax provided by Chapter 12, Title 80, Revised Statutes of Utah, 1933, may be denoted by many different terms, such as an inheritance tax, an estate tax, a death duty tax; but in the final analysis the tax is in reality a transfer tax—a tax upon the right to transfer property at death. *See State Tax Commission* v. *Backman, supra.* Certainly, it is reasonable classification for the state to say that it will tax only transfers made upon death and not transfers by sale or gift inter vivos.

If, as we feel sure, the respondents do not contest the proposition that the type of transfer tax levied by New York, as discussed above, is constitutional, then certainly there can be no constitutional or other objection to the transfer tax proposed here.

Respondents also may argue that the laws of the State of New York govern the devolution of and succession to the personal property in this case by reason of the fact that the decedent was a resident of New York. With that proposition we do not quarrel. We admit that the laws of the State of Utah can have no bearing upon the right to succession, the degrees of succession, or other determinative factors in connection with the probate of personal property belonging to this decedent's estate. From this proposition respondents may argue that, therefore, the State of Utah cannot tax a transfer of the property here concerned at death since that transfer is governed, so far as probate is concerned, by the laws of the State of New York. We submit that this argument, if made, is completely a *non sequitor. Curry* v. *McCanless, supra,* page 370 of 307 U. S., where this Court states:

> "And since Alabama may lawfully tax the property in the trustee's hands, we perceive no ground for saying that the Fourteenth Amendment forbids the state to tax the transfer of it or an interest in it to another *merely because the transfer was effected by decedent's testamentary act in another state.*" (Italics ours.)

The laws of the United States of America also have nothing to do with and can have no effect upon the devolu-

tion of or succession to property, or the probate of the estate of this decedent. Yet the jurisdiction and power of the Federal Government to levy an estate or transfer tax upon the transfer of property at death, which tax is, so far as material, identical with that imposed by Utah laws, has never been doubted since the decision in *Knowlton* v. *Moore*, (1900) 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747.

The Court's analysis of the power to levy the tax in *Knowlton* v. *Moore*, while specifically directed to upholding the jurisdiction of the Federal Government to levy an estate or inheritance tax, is pertinent and controlling here. The argument was made that since only state law could control the transfer and succession to property on death (admitted at page 58 of 178 U. S.), the National Government could not levy an estate tax upon the transfer of property at death. In answer, this Court said, at 178 U. S. 59-60:

> "But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, *and not the right existing to regulate.* In legal effect, then, *the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation,* by either the government of the United States on the one hand or the several States on the other, *the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the propostion denies the authority of the States to tax objects which are confessedly within the reach of their taxing power,* and also excludes the National Government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the State cannot be taxed, because it had been at some prior time the

subject of exclusive regulation by Congress? Again, interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the several States, because Congress may regulate interstate commerce? Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts which arise from its ownership, are subject more or less to state regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, even in the form of a stamp duty. It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and state governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them." (Italics ours.)

Similarly, care should be taken here not to confuse the power to regulate with the power to tax. We are not here concerned with jurisdiction to regulate or control succession to property. We are here concerned with taxation of the transfer of property within Utah's jurisdiction.

Before concluding our argument under this point, let us consider the cases cited by respondents at page 8 of their brief in opposition to petition for writ of certiorari. Respondents assert that *First National Bank of Boston* v. *Maine, supra,* has not been overruled but has been cited with approval in the cases there listed. An analysis of these cases will disclose that in none of them is the *Maine* case used for authority upon any point other than in connection with a double taxation argument and, further, a study of each of these cases will show that in reality the authority of the *Maine* case has been successively weakened. We treat each of these cases in order.

Lawrence v. *State Tax Commission,* (1932) 286 U. S. 276, 76 L. ed. 1102, 52 S. Ct. 556. The *Maine* case is cited only for the proposition that the state of the domicile of the owner of intangibles may tax such domiciliary upon the

receipt of income therefrom. This point is not involved in the present case; hence distinguishable.

Burnet v. *Brooks, supra.* We have treated this case previously in this brief and submit that its principles support petitioner, not respondents.

City Bank Farmers Trust Co. v. *Schnader,* (1934) 293 U. S. 112, 79 L. ed. 228, 55 S. Ct. 29. The *Maine* case is cited only in connection with dictum, since the power of Pennsylvania to tax the transfer of paintings (tangibles) was upheld. Furthermore, it is cited in this case only for the proposition which we submit is no longer law, namely, that the Fourteenth Amendment prohibits multiple taxation.

Senior v. *Braden,* (1935) 295 U. S. 422, 79 L. ed. 1520, 55 S. Ct. 800. This case involved an ad valorem personal property tax and the *Maine* case is cited only with reference to what the majority opinion refers to as "double taxation". Note, also, the vigorous dissent, sharply criticizing this double taxation theory, by Mr. Justice Stone, joined by Justices Brandeis and Cardozo, from which we quote in part, at pages 433-434 of 295 U. S.:

> "Tax laws are neither contracts nor penal laws. The obligation to pay taxes arises from the unilateral action of government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute the burden among those who must bear it. See *Alabama* v. *United States,* 282 U. S. 502, 507. To that obligation are subject all rights of persons and property which enjoy the protection of the sovereign and are within the reach of its power.
>
> "For centuries no principle of law has won more ready or universal acceptance. Even now that it is doubted, the doubt is rested on no more substantial foundation than want of 'jurisdiction' to tax, and the assertion that the Fourteenth Amendment is endowed with a newly discovered efficacy to forbid 'double taxation' when the sovereignty imposing the tax is that of two or more states. See *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 210; *Safe Deposit &*

Trust Co. v. *Virginia,* 280 U. S. 83, 92; *Baldwin* v. *Missouri,* 281 U. S. 586, 593; compare *Burnet* v. *Brooks,* 288 U. S. 378, 400, *et seq.* But as no opinion of this Court has undertaken to define the taxation which is thus forbidden because it is double, or to declare that different legal rights founded upon the same economic interest may never, under any circumstances, be compelled to contribute to the cost of government of two states whose protection they respectively enjoy, it would seem still to be open to inquiry whether the particular tax now imposed infringes any constitutional principle capable of statement and definition." And at page 439:

"In every practical aspect—and taxation is a practical matter—the trust certificate holder stands in the same relationship to the land as the stockholder of a land-owning corporation. It is not denied that the petitioner receives as much benefit and protection from the State of Ohio with respect to his certificates as does the owner of corporate stock, or that his interest is as much within the reach of the state power. Only by resort to subtle refinements of legal doctrine, devised without reference to the problems of taxation and irrelevant to them, or by treating the Fourteenth Amendment as an instrument for giving effect to our own peculiar convictions of what is morally or economically desirable, is it possible to sustain the taxation of the one and not the other.

* * *

"Whatever name we may give to the interest taxed, Ohio is not without jurisdiction of the land, the trustee, the certificates, or the owners of them. All are within the state. The objection to double taxation by a single sovereign is no more potent under the Fourteenth Amendment than the objection that a tax otherwise valid has been doubled. See *Carley & Hamilton* v. *Snook,* 281 U. S. 66, 72; *Magnano Co.* v. *Hamilton,* 292 U. S. 40. The imposition of a tax on a particular interest in land already taxed *ad valorem* does not infringe any constitutional immunity. *Swiss Oil Corp.* v. *Shanks,* 273 U. S. 407, 413 and cases cited."

Wheeling Steel Corp. v. *Fox,* (1936) 298 U. S. 193, 80 L. ed. 1143, 56 S. Ct. 773, involved an ad valorem property

tax. The *Maine* case is cited only on the so-called "double taxation" point; *yet the jurisdiction of West Virginia to levy the tax upon the intangibles of the foreign corporation was upheld.*

New York ex rel. Whitney v. *Graves,* (1937) 299 U. S. 366, 81 L. ed. 285, 57 S. Ct. 237. The *Maine* case is cited at 299 U. S. 372 only in summarizing appellant's argument that New York could not tax income in the form of a gain realized from the sale of a membership on the New York Stock Exchange which was owned and sold by appellant, a resident of Massachusetts. This Court then proceeded to hold *against appellant* who had tried to use the *Maine* case as authority. Hardly an affirmance of *First National Bank* v. *Maine;* Cf. *Citizens National Bank* v. *Durr, supra.*

New York ex rel. Cohn v. *Graves,* (1937) 300 U. S. 308, 81 L. ed. 666, 57 S. Ct. 466. The *Maine* case is cited at 300 U. S. 315, only in connection with this quotation, pages 314-5:

> "It would be pressing the protection which the due process clause throws around the taxpayer too far to say that because a state is prohibited from taxing land which it neither protects nor controls, it is likewise prohibited from taxing the receipt and command of income from the land by its resident, who is subject to its control and enjoys the benefits of its laws. The imposition of these different taxes, by the same or different states, upon these distinct and separable taxable interests, is not subject to the objection of double taxation, which has been successfully urged in those cases where two or more states have laid the same tax upon the same property interest in intangibles or upon its transfer at death. *Safe Deposit & Trust Co.* v. *Virginia, supra; Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1; *First National Bank* v. *Maine,* 284 U. S. 312."

The grudging concession that the "double taxation" argument had been given cognizance by the Court in the cases cited, including the *Maine* case, should hardly be

classified as citation with approval. Furthermore, the quoted portion of the *Cohn* v. *Graves* opinion might well be classified as dictum, since the only question before the Court was the constitutionality of a New York income tax on the receipt of income by a New York domiciliary from rents on New Jersey real estate. See *Lawrence* v. *State Tax Commission, supra.*

Worcester County Trust Co. v. *Riley,* (1937) 302 U. S. 292, 82 L. ed. 268, 58 S. Ct. 185, cites the *Maine* case only in relation to the petitioner's contentions regarding "double taxation"; the decision of the Court was *against petitioner.* The citation is in connection with what probably was dictum in any event, since the proceedings were dismissed by this Court on the grounds that the attempted suit under the Federal Interpleader Act was in reality a suit against a State and hence violative of the Eleventh Amendment.

Colorado Bank v. *Commissioner,* (1938) 305 U. S. 23, 83 L. ed. 20, 59 S. Ct. 48. Although respondents list this case as one citing the *Maine* decision, our reading of the case does not disclose any citation of *First National Bank of Boston* v. *Maine.*

The *Maine* case is, however, cited at page 23 of the 305 U. S. report of *Guaranty Trust Co.* v. *Virginia,* (1938) 305 U. S. 19, 83 L. ed. 16, 59 S. Ct. 1, where, in an unanimous opinion, this Court upheld the taxation of income from the same trust by *two* states, saying, at pages 22 and 23 of 305 U. S.:

> "Has there been denial of Due Process——
>
> "The insistence is that the challenged assessment was upon the identical income already rightly taxed by New York; that, under numerous decisions by us, two or more states may not tax the same subject; this would amount to double taxation and infringe the Due Process clause. To support this proposition the cases noted in the margin[1] are cited. (Citing, among other cases, *First National Bank* v. *Maine*).
>
> "Those cases go upon the theory that the taxing power of a state is restricted to her confines and may

not be exercised in respect of subjects beyond them. Here, the thing taxed was receipt of income within Virginia by a citizen residing there. The mere fact that another state lawfully taxed funds from which the payments were made did not necessarily destroy Virginia's right to tax something done within her borders. After much discussion the applicable doctrine was expounded and applied in *Lawrence* v. *State Tax Commission*, 286 U. S. 276, and *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308. The attempt to draw a controlling distinction between them and the present cause, we thing, has not been successful." (Parenthetical insertion ours.)

Curry v. *McCanless, supra,* has been fully discussed in this brief; it cannot, by any stretch of the imagination, be called an affirmance of the principles of *First National Bank.*

We submit that the *Guaranty Trust Co.* v. *Virginia, Cohn* v. *Graves, Lawrence* v. *State Tax Commission, Whitney* v. *Graves* and *Burnet* v. *Brooks* cases, *supra,* definitely weaken and show the error of *First National Bank* v. *Maine;* further, that these decisions are, in principle at least, favorable to petitioner's case at bar. We submit that *Wheeling Steel Corp.* v. *Fox, supra,* is not in point, but, if in point, is in principle favorable to petitioner. The other cases treated are obviously distinguishable. These cases serve, however, to illustrate further what we here urge—that this Honorable Court has gradually pulled away from the error of the *First National Bank* case until finally, in *Curry* v. *McCanless, Graves* v. *Elliott, Newark Fire Insurance Co.* v. *State Board of Tax Appeals, supra,* and other cases herein discussed, the whole superstructure of that decision comes tumbling down to again disclose what the court now builds upon—the firm foundation of fundamentals in applying the test of due process of law. Tested by those fundamentals, free from glossary and paraphrasing, this tax by the State of Utah is highlighted, free from constitutional objections.

We, therefore, urge that this Honorable Court re-examine *First National Bank of Boston* v. *Maine, supra,* specifically reverse that decision and hold valid and constitutional the levy of the estate tax by the State of Utah under the circumstances of this case.

CONCLUSION

It is respectfully presented that the Supreme Court of the State of Utah erred in holding unconstitutional the levy of the tax in the case at bar and that this Honorable Court should reverse that decision.

Respectfully submitted,

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APPENDIX A.

Chapter 12, Title 80, Revised Statutes of Utah, 1933, As Amended by Chapter 88, Laws 1935

Section 80-12-2:

A tax equal to the sum of the following percentages of the market value of the net estate shall be imposed upon the transfer of the net estate of every decedent, whether a resident or nonresident of this state:

Three per cent of the amount by which the net estate exceeds $10,000 and does not exceed $25,000;.

Five per cent of the amount by which the net estate exceeds $25,000 and does not exceed $75,000;

Eight per cent of the amount by which the net estate exceeds $75,000 and does not exceed $125,000;

Ten per cent of the amount by which the net estate exceeds $125,000; *provided,* at the discretion of the tax commission, the taxpayer may choose to pay in kind on an estate or any portion thereof which is not liquid.

Section 80-12-3:

The value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property, real or personal, within the jurisdiction of this state, and any interest therein, whether tangible or intangible, which shall pass to any person, in trust or otherwise, by testamentary disposition or by law of inheritance or succession of this or any other state or country, or by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after his death.

Section 80-12-9:

Where any property belonging to a foreign estate is subject to the payment of the tax herein provided for, such tax shall be assessed upon the market value of such property remaining after the payment of such debts and expenses as are chargeable to the property under the laws of this state, and, in the event that the executor of such foreign estate files with the clerk of

the court in this state having ancillary jurisdicti
statements in writing exhibiting the true market va
of the entire estate of the decedent, and the amount
indebtedness for which the decedent has been adjud
liable at the time of his death in other jurisdictio
which statements shall be in affidavit form and sw
to by such executor, there shall also be deducted su
proportion of the said indebtedness of the deced
from the value of the property within this state as
value of the property within this state bears to
value of the entire estate; *provided*, that in all su
cases where the property within this state consists
personal property only, the statements hereinbef
provided for shall also be filed with the state tax co
mission.

Section 80-12-34:

If an executor shall assign or transfer any c
porate stock or obligations standing in the name o
decedent, or in trust for a decedent, liable to tax he
under, the tax shall be paid to the state tax commissi
on or before the transfer thereof; otherwise, the c
poration permitting its stock or obligations to be
transferred shall be liable to pay such tax, and it is
duty of the state tax commission to enforce the pa
ment thereof.